THE
MODERN LAW REVIEW

Volume 18 July 1955 No. 4

SOME CHARACTERISTICS OF SCOTS LAW*

In speaking on the subject of some of the characteristics of Scots law I think I may fairly assume in this audience the knowledge that Scots law is different from English. Now this may appear a very modest assumption but beyond that it is unsafe to go because experience has proved to every Scots lawyer that the existence of his system distinct from that of England is by no means universally or even generally known. There are no doubt many reasons for this: there is the natural tendency to equate the larger part of the United Kingdom with the whole; there is the common, but quite unwarranted, use of the term England for the United Kingdom, a practice which many Scots find highly objectionable [1], and the existence of a common legislature and in many departments a common executive and common system of administration likewise tends to keep people, particularly abroad, in ignorance of the individuality of Scots law. It is a sad commentary on the state of knowledge that at the Third International Congress of the International Bar Association in 1950 there was some difficulty in establishing the entirely separate status of the Scottish legal profession in the United Kingdom, and it was only with the support of the leading English representatives that the Scottish claim was conceded.[2] "It was gratifying to observe that interest in the law of Scotland developed among a good number of the delegates who were interested in comparative law, yet it was regrettable to note

* An address given to law teachers of the University of London at the Institute of Advanced Legal Studies.

1 One recent and extremely unfortunate instance of this was in the Queen's broadcast on Christmas Day, 1953, from New Zealand, when she referred to herself as "Queen of England." This provoked considerable feeling in Scotland. The matter was raised in various local authority and other meetings and resulted in protests to the Secretary of State for Scotland. Needless to say Scots with nationalist sympathies (and they are many) bitterly resented the words, though that does not involve lack of loyalty to the Monarchy or want of regard or affection for the Queen personally. *Inland Revenue* v. *Mackintosh* (Edinburgh Sheriff Court, 1954) shows that this slip has resulted in at least one refusal to pay income tax. Compare the dissatisfaction with the numeral in the royal title: *MacCormick* v. *Lord Advocate*, 1953 S.C. 396, discussed 69 L.Q.R. 512.

2 See report in 1951 S.L.T.(News) 37.

that many foreign lawyers came to the conference quite unaware of the separate existence of the Scottish legal system. Much remains to be done to impress on the lawyers of the world the part which Scots law can and should take in mediating between the civil and common law systems." [3]

This complete ignorance is, I am afraid, quite common even among law students in England and no doubt it is the normal state of affairs among the general public. The public's knowledge of law is derived mostly from the press and from such sources as detective fiction, both of which deal with English law and procedure far more frequently and fully, and consequently English terminology and forms are far more generally known than Scottish; the coroner's inquest is better known than the workings of the procurator-fiscal's department, while even in Scotland, for every one who speaks of confirmation, ten will speak of probate. While Government publications are on the whole accurate and reasonable in their treatment of the differences which exist not all writers or publishers are so scrupulous.[4]

Moreover once the existence of distinction between the two systems of law is admitted, the extent of that difference is commonly much under-estimated, not least in Parliament and in the House of Lords. The view is sometimes expressed that Scots law, apart from criminal law and procedure and matters of terminology, is substantially the same as English.[5] I have no hesitation in saying that that view is fundamentally wrong.[6] It is true that in many cases both systems of law would grant what is in effect the same remedy on a given set of facts, but the principles underlying the decision may be fundamentally different. This is well brought out in *Leitch* v. *Leydon*.[7] That case was an application for interdict (*anglicé* injunction) by a firm of mineral water manufacturers against a grocer who had refilled from his soda fountain empty bottles tendered by members of the public, the bottles being marked with the complainers' name and being their property. The House of Lords affirmed the interlocutor of the Court of Session refusing interdict. But what is interesting is the

[3] *Ibid.*, p. 39.

[4] What of the Pelican book entitled *The English Parliament*? That body was abolished in 1707. So too Bagehot and Amos both wrote on *The English Constitution*. Legally there is no such thing. Hood Phillips (*Constitutional Law*, p. 606) says "The United Kingdom is the State for the purpose of International relations, though it is often *popularly but inaccurately* referred to as Great Britain, Britain or England." Books on constitutional matters invariably devote quite inadequate attention to the existence of differences in the operation of constitutional and administrative law between the two countries. For a short statement from the Scottish standpoint see Fraser, *Outline of Constitutional Law* (2nd ed., Hodge, 1948).

[5] See this view criticised by Smith, "Comparative Observations on Scots and English Consistorial Law," in 1952, 69 L.Q.R. 30.

[6] David, *Introduction à l'Etude du Droit privé de l'Angleterre*, at p. 164, characterises Scots law as "très différent du droit anglais."

[7] 1931 S.C.(H.L.) 1; [1931] A.C. 90.

line of reasoning. Lord Blanesburgh [8] deplored that a decision of Parke B. had not been cited and devoted his judgment entirely to a discussion of English authority. His judgment was not merely framed in terms of English law but included technicalities which no Scots lawyer understands.[9] He referred to it " because I have not noted in the proceedings in the Court of Session that any distinction was taken there between the principles of Scots and of English law applicable to this case. Authorities in both countries were quoted indifferently." (Examination of the report of the case in the courts below [10] shows that in argument a few English authorities were cited on collateral issues but that the judgments proceeded on grounds of principle rather than authority.) But to him Lord Dunedin made this crushing retort [11]: " Although I think it is quite true that the general considerations on which this case falls to be determined are the same in Scots and English law, it is quite a different thing to say that Scots and English law are so much the same that you can quote cases as quoted by my noble and learned friend—the older authorities on trover and conversion—and make them Scottish authorities. The law of England as to trover and conversion is, in many senses, a very technical law, and it is largely put aside now in modern times; but these older authorities go very technically upon English distinctions. Trespass as to a chattel in a Scottish lawyer's mouth is a perfectly unmeaning phrase, and, accordingly, I cannot think that the authorities quoted by my noble and learned friend have anything to do, in a Scottish case, with the question of sustaining the respondent's fifth plea in law." [12]

Application of Statute Law

In truth it would be more true to say that there are very few departments or branches of the law which are absolutely identical in both countries, though to an increasing extent individual rules, particularly if of statutory origin, are the same in both countries in some branches of the law. Even in matters of statutory regulation, while the wording of the statute may apply equally to both countries, its application may turn out different when it comes to be applied within the framework of a different system. For instance the Motor Spirit (Regulation) Act, 1948, created for both Scotland and England the offence of having " red " petrol in the tank of a private car. The Act provided that a certificate signed by an authorised analyst certifying the ingredients of a sample of motor spirit should

[8] 1931 S.C.(H.L.) at p. 9; [1931] A.C. at p. 103.

[9] *e.g.*, " It was an action of trover . . . The defendant was the High Sheriff of Carmarthenshire, who had seized and sold under a *fi. fa.* against David . . ." A Scots lawyer has no idea what that means.

[10] 1930 S.C. 41.

[11] 1931 S.C.(H.L.) at p. 8; [1931] A.C. at p. 102.

[12] The case prompts the reflection: how does one ascertain the *ratio decidendi* of a case when one of the noble and learned Lords decides it under another system of law from that applicable?

be evidence of the facts therein stated. But in *Bisset* v. *Anderson* [13] it was held that this merely made the certificate admissible evidence, but it did not make it satisfy the Scottish rule of sufficiency which requires corroboration of evidence in all cases, and hence a conviction proceeding on the certificate of one analyst alone had to be quashed. The different background of evidence had resulted in a difference though none was expressed in the Act creating the offence.[14]

Again there are several fields of law, principally the creations of modern statutes, where the law of Scotland is very substantially the same as that of England, but not entirely so,[15] so that on particular points a decision in one country is an unsafe guide to the law of the other. In other instances, of course, while the same broad principles apply a separate statute is necessitated by differences of terminology and of background as in the case of Town and Country Planning, where the legislation has to be established against a radically different background of land law and conveyancing. In this connection I may observe that a Scots lawyer would in every case like separate legislation for Scotland, as one of the difficulties superadded in a Scottish court to the ordinary difficulties of statutory interpretation is the "application to Scotland" section at the end of an Act. The Act has been initially drafted in English legal terminology with English legal conditions in mind and a section, frequently a lengthy one, is inserted at the end to say that for Scotland certain provisions are to be added or subtracted and certain terms of art to be substituted. It is a thoroughly unsatisfactory system, as, quite apart from the fact that it involves reading the Act with constant reference to the application section, the terms of art of one system cannot always be transposed for those of the other.[16] Again this process of substitution may overlook a phrase which requires translation. Thus section 13 (2) of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act, 1951, in a section which purports to apply equally to both countries uses the phrase "action of damages for conversion." There is no such thing in Scots law; the term conversion is unknown in the sense intended

[13] 1949 J.C. 106.

[14] So too in the question of "special reasons" for remitting the statutory disqualification in the case of drivers convicted under Road Traffic Act, 1930, s. 15, the Scottish courts have taken a slightly different view of the law from that adopted in England: *Irvine* v. *Pollock*, 1952 J.C. 51.

[15] *e.g.*, the Sale of Goods Act, 1893, the Partnership Act, 1890, and the Companies Act, 1948, all contain odd provisions peculiar to one country or the other. It is only broadly true that these matters are the same in both countries.

[16] Some recent instances are: Public Utilities Street Works Act, 1950, s. 36 (nearly 3 pp. "application," plus 5 pp. "interpretation" section); Reserve and Auxiliary Forces (Protection of Civil Interests) Act, 1951 (at least two application sections (ss. 24, 25 (7)) and numerous whole sections not applicable to Scotland); in the Crown Proceedings Act, 1947, s. 41 (the application section) there is some dubiety as to where the printer has placed the closure of a bracket, which results in some dubiety as to the true application of s. 21 of the Act to Scotland.

and the remedy is restitution, not damages. It is not surprising that Scots lawyers dislike statute law possibly even more than do English lawyers, and this kind of confusion is one reason why I personally dread the possibility and abhor the suggestion that the law of Great Britain should be codified. It would almost certainly be codified on English lines in complete ignorance and disregard of Scots law.[17]

INDIVIDUALITY OF SCOTS LAW

These instances may show how the legislature and the court of ultimate appeal not infrequently do harm to Scots law. Far too often it is thought that what is truly a general similarity leading to the same legal result in both systems is truly identity of principle masked by difference in terminology, but frequently the difference in principle is really fundamental and springs from the fact that Scotland belonged formerly to the civil law and not to the common law camp. Scots law is today still in the position of a hybrid system of indigenous common law with a large infiltration of Roman law, systematised under Roman influence in the seventeenth and eighteenth centuries, and only since the early nineteenth century affected to any substantial degree by the infusion of English legal principles. This intermediate position between the civil and common law systems Scotland shares with Quebec, the Roman-Dutch system of South Africa and Louisiana. It is interesting to note that Professor Schlesinger [18] classifies Scots law as a civil law jurisdiction without even the asterisk of doubt which he attaches to those countries which are now only doubtfully civil law jurisdictions.

It is surprising and disappointing that so little attention has been devoted in England to Scots law as a subject of comparative study. Those who think it is not sufficiently distinct from English law may well be taking too superficial a view because the differences in common law between the two systems are frequently radical. "Although in these modern times, when law is so largely the creature of statute and is so much more concerned with commercial and with social questions on which the two countries have now a common [19] body of legislation, the old distinctions have been much obliterated, the background of the two systems remains fundamentally different. To the student of comparative law an

[17] Thus the co-operative volume on *The Reform of the Law* (1951) contains only a few references to Scots law and its advocacy of codification contains the clearest implication that Scots law is to be assimilated to English as, unless on odd points, one cannot conceive of England and the predominantly English Parliament accepting any substantial measure of infusion of Scottish principles. The book, like so many English ones, gives no proper consideration to Scotland or Scottish conditions at all.

[18] *Comparative Law: Cases and Materials*, 1950, p. 484; so too Pound, *Outlines of Jurisprudence* (5th ed.), pp. 211, 213; *cf.* Amos, "The Common Law and The Civil Law in the British Commonwealth of Nations" (1937) 50 Harvard L.R. 1249; Lawson, *Rational Strength of English Law*, p. 5.

[19] *Pace* the learned author, this word is not literally and absolutely accurate.

examination of this contrast could not fail to be illuminating for the contrast is that between the two main schools of legal thought, the logical and the empirical." [20] Again the late Professor Lévy-Ullman, no mean authority, has remarked of the law of Scotland [21] that the harmonious reconciliation of the traditions of the common law with those of the civil law which it exemplified might well serve as a model for a future common law of the civilised world, and he described it as "absolutely Roman in character." Whether it is a consequence of the Auld Alliance between Scotland and France or not, the French comparative lawyers have always been conspicuously more appreciative of the virtues of Scots law than have English scholars and judges,[22] and for that reason I am putting forward the suggestion that comparative legal studies in England should not lose sight of Scots law as a system to be considered.[23]

If then you will accept that Scots law still has a substantially separate existence and also sufficient individuality to make it not just a modified version of English law but something distinct and worth studying I should like to look at some of its fundamental characteristics.

Some Characteristics of Scots Law

In broad outline and considered as a whole Scots law is thoroughly hybrid and selective. There was almost certainly an initial Celtic

[20] Lord Macmillan, *Scots Law as a Subject of Comparative Study* in *Law and Other Things*, pp. 102, 111; *cf.* Gutteridge, *Comparative Law* (2nd ed.), pp. 24, 129, 137.

[21] "The Law of Scotland" (1925) 37 Jur.Rev. 370. See also the same learned author: *Lé Droit écossais; Bulletin de la Société de législation comparée* (1924) LIII, pp. 148–9.

[22] See *e.g.*, David, *Traité Elementaire de Droit Civil Comparé*, 1950, 307; Arminjon, Nold et Wolff, *Traité de Droit Comparé*, Vol. III, 1951, p. 199; *cf.* also David, *op. cit.*, n. 6, *supra*.

[23] Apart from the considerable general literature on Scots law, there are already in existence a number of studies expressly written from the comparative angle. Among these may be mentioned: Patterson, *Compendium of English and Scotch Law* (1860); Brodie-Innes, *Comparative Principles of the Laws of England and Scotland* (1903); Burn-Murdoch, *Notes on English Law as Differing from Scots Law* (1924); Burn-Murdoch and Hill, "English Law in Scots Practice" in *Encyc. of Laws of Scotland*, Vol. 6, p. 162; Lovat-Fraser, "Some points of difference between English and Scots Law," 10 L.Q.R. 340; 11 L.Q.R. 1; Gibb, "Inter-relations of the Legal Systems of Scotland and England," 53 L.Q.R. 61; A. D. G[ibb], "Comparative Outline of Scottish and English Procedure," 1934 S.L.T.(News) 33; Viscount Dunedin, "Divergencies and Convergencies of English and Scots Law" (David Murray Lecture), *Glasgow University Publications*, 1935; Fisher, "Scotland and the Roman Law," 22 Tulane L.R. 13; Cooper, "The Common and the Civil Law—A Scot's View," 63 Harvard L.R. 468. On special topics are: Normand, "The Public Prosecutor in Scotland," 54 L.Q.R. 345; *Idem*, "Consideration in the Law of Scotland," 55 L.Q.R. 358; *Idem*, "Law of Defamation in Scotland," 6 Camb.L.J. 327; Millar, "Civil Pleading in Scotland," 30 Mich.L.R. 545, 709; Mackay, "Evidence and Procedure in Scotland: a comparison with England," 14 M.L.R. 162; Hoal, "Criminal Procedure in Scotland," 64 S.A.L.J. 319; Alpha, "Scotch Criminal Procedure," 64 S.A.L.J. 488; Cooper, "Frustration of Contract in Scots Law," 28 J.C.L. (3rd) 1; Loewensohn, "Conveyancing in Scotland and on the Continent," 63 Sc.L.Rev. 97; Charteris, "Scotland and the Common-Law System of Private International Law," 11 Aust.L.J. 378; Winder, "Undue Influence in English and Scots Law," 56 L.Q.R. 97.

element but this has left no substantial marks at the present time. Then there was an element of Scoto-Norman law exemplified in the *Regiam Majestatem*, which probably dates from about 1250, and there was a considerable mass of native law and statutes in existence by the fifteenth century. Feudal law was known in Scotland from at least the thirteenth century and still lies at the root of our land law. In Orkney and Shetland udal law of Norse origin still applies to the tenure of some land.

Canon law elements had been introduced by churchmen prior to the Reformation and it is known that the civil law was being studied in the thirteenth century.

1532 saw the establishment, after sundry abortive efforts, of a supreme court of civil jurisdiction, under the authority of a Papal Bull. This stimulated the study of civil law, particularly as the practice developed of Scots advocates going to France and more particularly to Holland to study law, with the result that the civil law was appealed to to supplement the deficiencies of the native law. In particular Stair's *Institutions*, published in 1681, provided Scotland with a Restatement of her law in which civil law principles were drawn on to supplement rather than to supplant native rules. There was no complete reception or adoption of Roman law, and, though there are passages in the books which suggest the contrary, the Roman law was never taken as the common law of Scotland. Thereafter as the law developed reference was still made to the Roman law and some principles were adopted and some rejected.

Since 1707, and more particularly since 1800, English influence has been strong and continually growing under the influence of a common legislature and court of final appeal. Some elements from English law have been voluntarily adopted but a great many have been thrust upon us.[24] The system as it now stands has therefore elements of native law, canon law, civil law and English common law and equity interwoven, with varying traces from the other sources I have mentioned.

In considering the characteristic features of this system I shall take my text from Stair's *Institutions* (Book I, title 1, section 16). "The law of Scotland in its nearness to equity, plainness and facility in its customs tenors and forms, and in its celerity and despatch in the administration and execution of justice may be well paralleled with the best law in Christendom." I am not going to attempt to show how far this bold claim is still justified, so much as to take it as a peg on which to hang my observations. Stair then takes as a first salient characteristic of Scots law its equitable character and nearness to equity. Stair devoted much attention to equity, which is possibly not surprising when one recollects that he was a Regent in Philosophy in the University of Glasgow before

[24] Some instances are noted later in this paper.

ever turning to the study of law.[25] By equity Stair understands principles of natural justice drawn from reason and the idea of right. It is a great mistake to think that Scots law does not have an equitable element. Of course, for reasons of legal history and development, there is not and never has been a Court of Chancery or of Equity in Scotland, nor a distinct system of equity, but equity in the general sense of principles derived from natural justice is widely present in Scots law and its existence and influence are fully recognised.[26] It is rather amusing to note that Lord Chancellor Hardwicke in his correspondence with Lord Kames [27] insisted on his preference for a system which divided equity from law, while Lord Chancellor Eldon thought that the House of Lords could never properly deal with appeals from Scotland until such a distinction had been established.[28]

The courts have repeatedly emphasised that the Court of Session is a court both of law and of equity and that it may always entertain and give effect to equitable pleas and claims. In consequence of the jurisdiction never having been divided equitable pleas and remedies are so interwoven into the texture of Scots law that they are indistinguishable from strictly legal pleas and in many cases their equitable nature and origin is now forgotten. Kames noticed that this was taking place two centuries ago. A further consequence of the undivided jurisdiction is that there is no distinction in Scots law between legal and equitable rights, legal and equitable mortgages and so on. Thus for example there is a rule of Scots law that where writing is requisite for the constitution of a contract (as in the case of the sale of land) and that writing is lacking or defective its absence may be supplied by *rei interventus*, or actings on the faith of the agreement and unequivocably referable thereto. This, of course, is precisely what the Chancery courts know as the doctrine of part performance, a creation of equity purely. It is interesting to note that the classic definition of the doctrine in Scots law, penned by Bell [29] in 1829, was quoted and approved in the leading Chancery case of *Maddison* v. *Alderson*.[30]

Comparative examination reveals, broadly speaking, that the topics which were the prerogative of the Chancery in England have also undergone equitable influence in Scotland and they are also

[25] On Stair, generally, see Aeneas J. G. Mackay's *Memoir of Sir James Dalrymple, First Viscount Stair* (1873), and the same writer's life of Stair in D.N.B.; Graham, *Annals and Correspondence of the Viscount and First and Second Earls of Stair* (2 vols., 1875). On his legal thought, see Campbell, "The Structure of Stair's Institutions" (David Murray Lecture, Glasgow, 1954).

[26] This theme is more fully developed by the present writer in "Equity in Scots Law," 66 Jur.Rev. 103.

[27] Kames wrote *The Principles of Equity*, the only Scottish book on the subject. First published 1760, it reached a fifth edition in 1825.

[28] Turberville, 52 L.Q.R. 189, 205.

[29] *Principles of the Law of Scotland*, § 26.

[30] (1883) 8 App.Cas. 467, 476.

principally subjects in which Scotland has drawn largely from Roman law. For examples the various *condictiones*, *negotiorum gestio*, interdicts, *collatio bonorum*, the *lex Rhodia de jactu* and so on. The law of trusts is well-established and certainly in its later development it owes much to Chancery decisions [31] but I am not at all sure that, as is sometimes asserted,[32] the whole doctrine has been adopted from England. As early as 1696 the trust was common enough to have the mode of proof regulated by statute and there are hints of what was essentially the trust doctrine in the fifteenth century. As worked out today the detailed rules are not in all respects the same in both countries but there is little substantial difference in the broad underlying fiduciary duties. The rules relating to charitable trusts are, however, substantially different.[33]

One interesting difference between the two countries is in the law of specific performance. As you know, in England this was a discretionary remedy granted originally by the Chancery only where justice required it owing to the inadequacy of damages as a remedy. In Scotland on the other hand specific implement has always been an ordinary remedy which the litigant was prima facie entitled to unless the requirements of justice demanded that the court should in the exercise of its discretion refuse implement and give only damages in lieu.[34] The extent to which this principle was formerly followed may be seen from the fact that there are instances in the late fifteenth century of the court decreeing specific implement in cases of breach of promise of marriage, performance to take place before the next Whitsunday.

The second characteristic mentioned in the passage from Stair which I have taken for my text was "plainness and facility in customs and forms." I think this involves two matters, simplicity of form and regard for principle. Scots law has never been confined by particular forms of actions or limited by writs: the use of brieves or forms of writs for initiating particular actions was abandoned very early and throughout the whole modern development of the law actions have been initiated by a general form of summons which could be modified so as to be applicable to any kind of case, so that in effect every action was an "action on the case." [35] In the second place there has always been a remarkable absence of artificial doctrines and irrational distinctions which have outgrown their original purpose. Fictions have played no part

[31] *Cf.* Lawson, *op. cit.*, 32.

[32] *e.g.*, Amos in 50 H.L.R. 1249 at 1264.

[33] Some instances are discussed in *Wink's Exors.* v. *Tallent*, 1947 S.C. 470, 476. But for the purposes of revenue law the English meaning of "charity" and "charitable" is to be followed in Scotland: *Inland Revenue* v. *Glasgow Police Athletic Association*, 1953 S.C.(H.L.) 13. The difficulties this doctrine imposes on Scottish courts are considerable. See Smith in "Two Scots Cases," 69 L.Q.R. 512; *cf.* also 65 Jur.Rev. 121, and 1953 S.L.T.(News) 165.

[34] *Stewart* v. *Kennedy* (1890) 17 R.(H.L.) 1; 15 App.Cas. 75.

[35] Cooper, "The Dark Age of Scottish Legal History" (David Murray Lecture, Glasgow), *Glasgow University Publications*, 1952, pp. 18–9.

in the development of the law and, apart from statutory provisions that one thing shall be " deemed to be " another, it is hard to find an instance of a fiction in Scots law. To give only three instances of the essential plainness of Scots law, no distinction is made between treason, felony and misdemeanour and all participants are equally liable in all cases. Again no distinction is made in defamation between libel and slander: defamation is always actionable *per se* without any question of special damage and without any need for publication to a third party.[36] Moreover defamation can never be criminal in Scotland. Again in the law of contract a gratuitous promise is enforceable without any question of consideration. The absence of consideration is not, however, entirely irrelevant on the issue of proof of the promise. The net result is probably much as in England, but we are spared all the obscure learning on consideration.[37]

Connected with this absence of reliance on forms of action is the very important fact of regard for principle. The absence of writs and forms of action, the infusion of Roman learning, and the systematic restatement of substantially the whole law of Scotland successively in the seventeeth, eighteenth and nineteenth centuries by Stair,[38] Erskine [39] and Bell,[40] our greatest institutional writers, all tended in combination to make the application of law in Scotland a matter of deduction from a broad principle rather than a quest for precedent and an attempt to subsume the case within the *ratio* of the precedent. I shall take my example from the law of reparation because this is a striking contrast with the English law of tort and because today the similarity of result achieved under each system may give the impression that the laws are the same. According to Erskine [41]: " *Alterum non laedere* is one of the three general precepts laid down by Justinian . . . In consequence of this rule, everyone who has the exercise of reason, and so can distinguish between right and wrong, is naturally obliged to make up the damage befalling his neighbour from a wrong committed by himself. Wherefore every fraudulent contrivance or unwarrantable act by which another suffers damage or runs the hazard of it, subjects the delinquent to reparation. . . . Wrongs may arise not only from positive acts of trespass or injury but from blamable omission or neglect of duty. . . . This obligation

[36] Normand, " Law of Defamation in Scotland," 6 Camb.L.J. 327, and see further, Cooper on *Defamation*, 2nd ed.; *Encyc. of Laws of Scotland*, Vol. 5, p. 483.

[37] Normand, " Consideration in the Law of Scotland," 55 L.Q.R. 358. For fuller treatment see Gloag on *Contract*, 2nd ed., pp. 48 *et seq.* *Cf.* also Lawson, *op. cit.*, 43–9.

[38] *The Institutions of the Law of Scotland* (1681), 5th ed., 1832.

[39] *An Institute of the Law of Scotland* (1773), 8th ed., 1871.

[40] *Principles of the Law of Scotland* (1829), 10th ed., 1899.

[41] III, 1, 13. Similarly, Stair I, 9, 6; Bankton I, 10, 41; Kames, *Principles of Equity*, 4th ed., p. 426; Bell, Prin., §§ 533, 544.

to repair the loss of another supposes some wrong committed by the party obliged; for no person ought to be subjected to the reparation of damage who has not by some culpable act or omission been the cause of it." That is the whole law of reparation. Individual delicts such as assault, defamation, ejection, fraud, and so on are just species of this genus.[42] I think it follows that the categories of what are recognised delicts are never closed and there is no obstacle to the court's acceptance of any unjustifiable act as a delict, and secondly, that the debate whether there is a law of delict or of delicts does not arise. Hence there are a number of instances [43] in the books of innominate wrongs which defy classification but were held to be delicts which justified reparation. It is also noteworthy that negligence is conceived as a modus in which a delict can be committed and not an independent delict.[44] Lastly, the breadth and generality of this statement and its affinity with similar statements of principle shows how relatively easily Scots law could have been codified, a result which would have been a natural result in the nineteenth century,[45] had not the union with England rendered this impossible then and unlikely now.

This reliance on broad principle underlies the difference of method in which Scots law shows affinity with civil law systems rather than with common law. "The civilian naturally reasons from principles to instances, the common lawyer from instances to principles. The civilian puts his faith in syllogisms,[46] the common lawyer in precedents . . . The civilian thinks in terms of rights and duties, the common lawyer in terms of remedies. The civilian is chiefly concerned with the policy and rationale of a rule of law, the common lawyer with its pedigree. The instinct of the civilian is to systematise. The working rule of the common lawyer is *solvitur ambulando* . . . The differences in method are fundamental and far more significant than the apparent similarity of the end products of widely different processes of thought." [47] The same point is at the root of the former Scottish freedom in handling precedent; a precedent was rather a previous example of the same line of thought than a case to be followed, and only a line of authority had any binding force. In modern times, however,

[42] On the development of the distinct species, see the present writer's "The Development of Reparation," 64 Jur.Rev. 101.

[43] Some are collected in *Encyc. of Laws of Scotland*, s.v. Reparation, Vol. 12, paras. 1071–2.

[44] It is accordingly strange to find *Donoghue* v. *Stevenson*, 1932 S.C.(H.L.) 31; [1932] A.C. 562, and *Lochgelly Iron Co.* v. *McMullan*, 1933 S.C.(H.L.) 64; [1934] A.C. 1, both Scottish cases, regularly cited in England as having established negligence as an independent tort.

[45] *Cf.* Cooper, 63 H.L.R. 468, 472; Smith, *Doctrines of Judicial Precedent in Scots Law*, 12, 69, 103.

[46] I have tried to show the syllogistic basis of Scottish legal reasoning in "The Theory of Relevancy," 63 Jur.Rev. 1.

[47] Cooper, 63 H.L.R. 468, 471.

Scottish practice has tended to be assimilated to English though it still retains rather more flexibility.[48]

The third characteristic mentioned by Stair was celerity and dispatch in the administration of justice. Today these considerations depend very much on matters of procedure and I must concede that the judicial machinery cannot operate so rapidly as the enviable speed of the piepowder courts. It is not that the judges are unaware of the position.[49] Nor are things in Scotland quite so well up to date as they were in the olden days when records tell of days when " the court rose early, having come to the end of the roll." It may, however, be of interest in this connection to mention that the view has been expressed to me by a Lord of Appeal that Scottish counsel are very much more expeditious than English in presenting an argument. At least one Scottish counsel [50] in the not too distant past was famous for the extreme brevity of his addresses.

The House of Lords as a Final Court of Appeal

I venture to think that the qualities enumerated by Stair as characteristics of Scots law are still substantially attributes of that system, though the baneful influences of Parliament and the House of Lords are steadily whittling down the qualities of reliance on principle and simplicity possessed by the native common law. I have said something of the unfortunate results of legislation by a largely alien and ignorant legislature debating comfortably remote from Scotland. I must now say a little of the House of Lords as the ultimate Court of Appeal from Scotland.[51]

In the first place it is a disputed point of history whether appeal lay from the Court of Session to the Scottish Parliament prior to the Union of 1707. The point was not mentioned in the Treaty of Union, but early in the eighteenth century appeals were carried to Parliament and the practice became established, the House no doubt accepting jurisdiction if only on the ground *boni judicis est ampliare jurisdictionem.* It remains doubtful, however, whether the practice of such appeals has any better foundation than *communis error.*

As you know, not until the Appellate Jurisdiction Act, 1876, was proper provision made for staffing the House of Lords in its judicial capacity. So from 1707 to 1867, appeals lay from the Court of Session to a body in which lay peers had a vote, a body presided over by a Lord Chancellor who was an English lawyer, with no Scots lawyer on the Bench, and frequently without even

[48] Gardiner, *Judicial Precedent in Scots Law*, 1936; Smith, *Doctrines of Judicial Precedent in Scots Law*, 1952.
[49] *Cf.* Cooper, " Defects in the British Judicial Machine," 2 J.S.P.T.L.(N.S.) 91.
[50] The late Condie Sandeman, K.C., Dean of Faculty.
[51] This topic is discussed in greater detail in Gibb: *Law from over the Border*, 1950.

the assistance of Scottish counsel. Sometimes in cases of doubt this tribunal obtained the assistance of the *English* judges. As late as 1904 the English judges were called in to advise on the disposal of a Scottish appeal.[52] In some cases the Chancellors had the decency to admit that they did not know anything about Scots law. Lord Chancellor Erskine said: "I know something of the law, but of Scotch law I am as ignorant as a native of Mexico."[53] Sometimes they were more generous and recognised their own deficiencies, but all too frequently they resorted to translation, by first thinking what the answer would be in English law and then translating that, so far as they could, into Scottish terms. This gave rise to the practice, which is still all too common, of saying and frequently assuming that the point at issue involved nothing peculiar to Scots law or that the laws of England and of Scotland were the same on the point. This was rarely the case and the speakers were seldom qualified to say so.[54] The House still utilises substantially the same trick and whenever in a modern case one is assured that the laws of the two countries do not differ sceptical Scots prepare for a piece of judicial legislation.

But the most blatant case is that of Lord Cranworth in the case of *Bartonshill* v. *Reid*,[55] on the question of common employment. Despite *Priestley* v. *Fowler*[56] common employment was not the law of Scotland down to this time. But Lord Cranworth, having considered the English cases, said: "But if such be the law of England on what ground can it be argued not to be the law of Scotland? The law as established in England is founded on principles of universal application not on any peculiarities of English jurisprudence and unless therefore there has been a settled course of decision in Scotland to the contrary I think it would be most inexpedient to sanction a different rule to the north of the Tweed from that which prevails to the south" and thus he saddled Scotland with common employment.

Only in 1867 was Lord President McNeill ennobled as Lord Colonsay to enable him to sit in the House when disposing of Scottish Appeals. He was not a great figure but this was a step in the right direction, but it must be said that prior to this time there was much rank bad law pronounced in Scottish appeals and many of these older judgments have only a waste-paper value. Conditions have, however, improved since then and in modern

52 In the famous Free Church case: *Free Church of Scotland* v. *Lord Overtoun* (1904) 7 F.(H.L.) 1; [1904] A.C. 515. This point appears from the memoirs of Lord Salvesen, who was counsel in the case: see *Memoirs of Lord Salvesen*, ed., Andorsen (Chambers, 1949), pp. 66–7.

53 Quoted in Yorke's *Life of Lord Chancellor Hardwicke*.

54 *e.g.*, *Irving* v. *Houstoun* (1803) 4 Paton 521, 530–1; *Purves* v. *Landell* (1845) 4 Bell's App. 46.

55 (1858) 3 Macq. 266, 285.

56 (1837) 3 M. & W. 1. If Lord Abinger planted the doctrine of common employment, Baron Alderson watered it and the Devil gave it increase, certainly Lord Cranworth transplanted a cutting into Scotland.

practice two of the salaried Lords of Appeal are Scots lawyers. But the fact remains that as the House usually sits five they are usually in the minority. There is no rule of law or practice which requires the attendance of *any* Scottish Law Lords at the hearing of Scottish appeals and to this day such cases are sometimes heard without a Scottish Lord present. The converse is not true of English appeals, since the Scottish Lords, if they sit at all, are not in the majority.[57] "The main objection to the House of Lords as the supreme civil tribunal can be stated in an inability to understand how ultimate exposition of the law of X by eminent exponents of the law of Y can, on balance, benefit the law of X."[58]

Of course, fictionally the House knows both systems of law, but how far is this really true? In each country the law of the other is a matter of foreign law to be established as a question of fact just as much as the law of France or of New York.[59] How is it that judges suddenly on promotion to the House of Lords acquire the knowledge to adjudicate on Scottish appeals? "An adequate knowledge of the law is not to be gained in a day. Each system has an idiom and a genius of its own as difficult to grasp in their perfection as are the idiom and the genius of a language. Just as a language is best expounded, not by the ignorant foreigner who has never studied but by a person steeped in it for a lifetime, so it is with the law of a country."[60] In my view the continuance of the present system is indefensible. If such appeals must be, they should be heard in Edinburgh[61] and at least a majority of the Lords should be men who have studied and practised the law of Scotland.[62] I am not much moved by the constitutional point that technically these are appeals to Parliament and to the whole House,

[57] A test scrutiny of English appeals to the House of Lords reported in [1951] A.C. shows twenty-six attendances by Scottish Law Lords to seventy-four by English Law Lords. In no case were more than two Scots present among the five. The Scottish Lords could then never by themselves affect any doctrine of English law. But in Scottish appeals the English Lords could have their way every time if so minded. Observe, too, how in *Crowther* v. *Crowther* [1951] A.C. 723, 734 (an English appeal), Lord Reid said that he had tried to put the law of Scotland out of his mind.

[58] Gibb, "Legal Systems of England and Scotland" (1937) 53 L.Q.R. 61, 69.

[59] This point caused difficulty in *Inland Revenue* v. *Glasgow Police Athletic Association*, 1953 S.C.(H.L.) 13, and the directions given by the House are profoundly unsatisfactory, if not completely unworkable. See also *Elliott* v. *Joicey*, 1935 S.C.(H.L.) 57; [1935] A.C. 209.

[60] Gibb, *Law from over the Border*, p. 2. In fairness to the present House it may be pointed out that the words quoted were written with particular reference to the eighteenth century, but the substance of the point is still valid.

[61] This would effect substantial saving in expense and the danger, still always present, of the London agents insisting on the employment of English counsel. Two sessions of a week each during the year would probably suffice for the disposal of all the business.

[62] *Cf.* Smith, "Epilogue to Epithalamium" (1950) 13 M.L.R. 340, 341–4, where the writer points out the lack of familiarity of the Lords with Scottish *usus fori*. See particularly the note on p. 342.

but in truth they are to a court, and this fact might well be recognised and less reliance placed on a fiction.

To take a recent instance of how the House alters Scots law, not always for the best, take the responsibility of the occupier of land to a person injured on that land. Scots law, characteristically, relied on a broad general principle whereas English law had by inductive reasoning from precedents converted distinctions of fact between cases into a rigid categorisation of the injured party, so that the inquiry became primarily one of into which class, invitee, licensee, or trespasser (and some would give other classes too) the plaintiff can be placed.[63] Thus in *Shillinglaw* v. *Turner*[64] a child was killed by falling through the railing of a landing on a common stair. Lord President Clyde said[65]: "It has to be kept in mind that in Scotland, where no artificial classification of actions has ever been observed, every action founded on negligence and breach of duty is presented to the court as an action 'on the case.' Most of those duties (whereof the breach constitutes negligence) arise simply out of the relation into which the complexities of social life bring the defender with the pursuer. Those relations are infinitely various, and in Scotland we have been slow and unwilling to classify and categorise them. This has been extensively done in England; hence the figures of 'trap' and 'allurement,' and hence the ever-growing list of 'trespassers,' 'bare licensees,' 'licensees,' 'licensees with interest,' 'invitees' and so on. I speak with nothing but respect of distinctions which I doubt not are useful and convenient in the administration of a system which, however much it resembles our own, is none the less animated by a genius which is subtly different from that which inspires ours. The plan we follow may be thought to err on the side of looseness, but it has the advantage of adaptability to the constantly varying materials with which it is devised to deal . . ." Later in the case[66] Lord Sands said: "I shall venture to formulate what I conceive to have been the understanding of the law of Scotland in relation to the obligations of proprietors as regards the safety of persons using their property as follows:—where a proprietor devotes the use of his property to a certain purpose, he is responsible if, through his negligence in allowing the property to be in a dangerous condition to those using it, injury is suffered by a person exercising ordinary care, whose lawful presence on and use of the premises must have been contemplated by the proprietor in view of the purpose to which his premises were devoted."

We now come to *Dumbreck* v. *Addie's Collieries*.[67] No categorisation was attempted in the Court of Session though the

[63] Winfield on *Tort* (5th ed.), p. 558, gives four classes: *cf.* Friedmann, *Law and Social Change*, p. 96.
[64] 1925 S.C. 807.
[65] At p. 816.
[66] At p. 820.
[67] 1928 S.C. 547.

English cases were canvassed: Lord President Clyde said [68]: "The measure of care which is due to any person or class of persons (supposing a duty to use care exists in relation to them at all) varies, as Lord President Dunedin pointed out in *Reilly* v. *Greenfield Coal and Brick Co.*,[69] with the class of instruments with which you are dealing." But on appeal [70] the House of Lords insisted on the distinctness of the categories and reversed the decision of the Court of Session. The decision in *Dumbreck*, right or wrong on its facts, therefore subverted a principle of Scots law and replaced it by rules of English law.[71] Those rules offend against the Scottish characteristics of simplicity and insistence on principle in the rules of law, and when one has regard to the rather confused state the law on this topic has now got into twenty-five years later I think it is very unfortunate for Scotland that this importation was ever made. It is now difficult to formulate the rules of law applicable to each category.[72] Is it too much to hope that when the Law Reform Committee are considering the topic they should look at the old law of Scotland?

The question whether Scotland could have managed without appeals to the House of Lords is to my mind conclusively answered by the case of criminal law. Appeal does not lie from the High Court of Justiciary to the House of Lords in any circumstances. In the Scottish criminal courts no English decision in criminal matters of the Lords or of any other English court is of greater than purely persuasive authority. In practice such decisions are referred to only when the court is discussing a case where a statute common to both countries or in very similar terms has been construed in England or a point of broad principle is involved, such as drunkenness as a defence, and the great majority of ordinary criminal cases and appeals are argued without any reference at all to English law. Moreover even in matters common to both countries, such as statutory offences, the Scottish court quite freely declines to follow the English cases. And the fact remains that the High Court of Justiciary has built up a very satisfactory body of criminal law without the assistance of the House of Lords and with scant regard to English practice. In many respects the

[68] At pp. 551–2.
[69] 1909 S.C. 1328, 1337.
[70] 1929 S.C.(H.L.) 51; [1929] A.C. 358.
[71] See also Lord President Cooper in *McPhail* v. *Lanarkshire County Council*, 1951 S.C. 301, 314–5, and Lord Keith at p. 319. It is interesting that the Scottish courts have refused to extend the doctrine to persons on vehicles: *Carney* v. *Smith*, 1953 S.C. 19. Mr. Marsh ("History and Comparative Law of Invitees, Licensees and Trespassers," 69 L.Q.R. 182, 359 at 381–2) thinks it is hard to understand why Scots law has abandoned for the sake of English law the general principles of liability. The abandonment has been enforced by the House of Lords: it was not voluntary.
[72] *Cf. London Graving Dock* v. *Horton* [1951] A.C. 737, on which see Friedmann, *Legal Theory* (3rd ed.) p. 329; Lord Wright in 67 L.Q.R. 532.

systems differ and I do not think they are any the worse for it.[73] There is no reason to suppose that the civil courts could not have done the same had they not been fettered by the appeal to London with its resultant transfusions.

Conclusion

I hope these observations will have shown you that Scots law does still possess certain distinctive features which made it something other than a pale reflection of English law and that it does have certain distinct merits. If the world, or even the Atlantic community, does make any substantial moves towards unification of rules of private law I hope the blending of civil and common law influences already exemplified in Scots law will not be lost sight of. So too as a subject for comparative study Scots law has distinct merits owing to its intermediate position between Roman and English law. Lastly, I do venture to suggest that English books on topics not wholly peculiar to English law could sometimes with advantage look at the Scottish authorities which they too often neglect.

David M. Walker.*

[73] It is interesting to note that the Royal Commission on Capital Punishment Report, 1953 (Cmd. 8932 of 1953), recommends very few changes in Scottish criminal law.

* M.A., LL.B.(Glas.), PH.D.(Edin.), Advocate of the Scottish Bar; Professor of Jurisprudence in the University of Glasgow.

IMMUNITY IN TORT AND THE TRADE DISPUTES ACT—A NEW LIMITATION?

The action of Parliament in 1946 [1] in repealing the Trade Disputes and Trade Unions Act, 1927,[2] had the effect, in part of the United Kingdom at least,[3] of restoring the earlier Trade Disputes Act, 1906,[4] to all its pristine glory. Throughout its history, the 1906 Act has been subjected to the most searching scrutiny and an immense amount of judicial time and energy has been expended on the task of defining its limits. Not the least of this has been devoted to the definition clause, section 5 (3), which purports to give legislative effect to the expressions "trade dispute" and "workmen."[5] Almost every word of this section has been judicially interpreted and it might have been thought that the action of the courts would have put matters beyond doubt. A recent decision from across the Irish Sea, however, merits examination, for it appears to impose a novel limitation on the operation of the Act as a whole, in so far as it confers immunity for acts done in the furtherance of a trade dispute.

Meaning of a "Trade Dispute"

In Eire, where the 1906 Act was never fettered by the restrictions imposed on it here between 1927 and 1946, there have been many cases dealing with the nature of a trade dispute. In the latest of these—*Smith* v. *Beirne and Others*,[6] the Supreme Court had to consider a set of facts which are, in themselves, sufficiently unusual to be worthy of comment; and the court's application of the legal principles involved is of considerable importance. The facts of the case are comparatively simple. The plaintiff was one of the trustees of a members' club known as "The City of Dublin Workingmen's Club," while the defendants were the secretary and two members of a trade union which exists for the protection of employees in the licensed trade in Eire. Some time prior to the

[1] Trade Disputes and Trade Unions Act, 1946.
[2] 17 & 18 Geo. 5, c. 22.
[3] In Northern Ireland, the limitations imposed in the other parts of the United Kingdom during the period 1927–1946 still apply: Trade Disputes and Trade Unions Act (N.I.), 1927.
[4] 6 Edw. 7, c. 47.
[5] s. 5 (3): "In this Act . . . the expression 'trade dispute' means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment, or with the conditions of labour, of any person, and the expression 'workmen' means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises. . . ."
[6] (1955) 89 Ir.L.T.R. 24.

proceedings, a decrease in the bar receipts at the club necessitated the discharge of one of the barmen employed there, who was a member of the union. A request from the union that he should be reinstated was met with a refusal, and the effect of this was that two of the defendants, the other barmen, withdrew their labour, and the union placed a picket on the club. The latter, through its trustees, promptly instituted proceedings in the High Court for an injunction to restrain this picketing. Dixon J. granted the relief sought and, on appeal to the Supreme Court, his decision was affirmed by a majority of three to one.

In granting the injunction, Dixon J. (with whose reasoning the majority in the Supreme Court agreed) proceeded on the following line of reasoning: (1) There was not in existence, at any material time, a "trade dispute" within the meaning of section 5 (3) of the Trade Disputes Act, 1906. Since the club was a members' club, the nature of which had been settled by authority,[7] it could not be said to be engaged in "trade or industry" as defined by the statute.[8] The work which the defendants were employed to do did not involve trading or the making of sales, and the fact that there may have been occasional breaches of the club rules, whereby excisable liquor was supplied to non-members, did not transform the club into a trading concern. If the club was not engaged in trade or industry, then, *a fortiori*, its employees could not be so engaged, and so were not "workmen" within the meaning of section 5 (3). (2) This being so, could there be said to be a trade dispute solely between the club, on the one hand, and the union on the other hand? Dixon J. answered this question in the negative. His interpretation of the Act led him to the conclusion that a trade union could only be a party to a trade dispute if and so far as its membership comprised "workmen" as defined by section 5 (3); if the union did not consist wholly of workmen in this sense, the dispute would not be with the union as a whole, but with the individual members thereof who happened at a particular time to satisfy the definition. In other words, the test of the existence or non-existence of a trade dispute is that of *actual employment*; it does not depend on the *status* of belonging to a particular union, or to a particular category of worker. Dixon J. added that, in his view, the term "employer" used in section 5 (3) must also be confined to a person engaged in trade or industry.

It was argued by the defendants that the 1906 Act could be extended to afford protection to steps taken to regulate the relations between an employer who was not engaged in trade or

[7] *Graff* v. *Evans* (1882) 8 Q.B.D. 373; *Re Junior Carleton Club* [1922] 1 K.B. 166; *Trebanog Working Men's Club* v. *McDonald; Monkwearmouth Conservative Club* v. *Smith* [1940] 1 K.B. 576.

[8] The expression "trade or industry" has been widely interpreted: *Rickards* v. *Bartram* (1908) 25 T.L.R. 181; *Dallimore* v. *Williams and Jesson* (1912) 29 T.L.R. 67.

industry and his employees, merely because the nature of the work which the employees were doing was the same as that done by other workers in trade or industry. Support for this contention was sought in the use of the word " person " rather than " workmen " in that portion of section 5 (3) which defines a trade dispute. Dixon J. thought that this word was employed in order to make it clear that, although workmen must be involved in the dispute, the dispute may also concern a person who, for some reason or other, does not come within the definition; he added: " One such reason would be that the dispute concerned the non-employment of a person who could not at that time be said to be ' employed in trade or industry.' " In the Supreme Court, Kingsmill Moore J. explained the use of the neutral word " person " by saying that " ' Workmen ' in ordinary speech is confined to those who do manual work, and if the word ' workmen ' had been used, it would have been natural so to confine its interpretation. The use of the words ' any person ' avoids this difficulty, and enables all persons engaged in any trade or industry to be organised as a unit for the purpose of collective bargaining."

This narrow view of the meaning of the word " person " in section 5 (3) was not shared by the dissenting member of the Supreme Court, O'Daly J. In a carefully reasoned judgment, he found himself unable to read this part of the section as meaning " any person employed in trade or industry," and he took the view that the word " person " was used by Parliament in order to permit employees a wider field for the exercise of the privileges conferred by the Act. While agreeing that it appeared anomalous that the club employees themselves (not being " workmen ") had to stand by and take no part in the dispute, he felt, nevertheless, that a trade dispute was properly constituted if it was one which was connected with the employment of any person, not necessarily employed in trade or industry. This conclusion involved a rejection of the principle, enunciated by Dixon J., that in order to constitute a valid trade dispute, both employer and employee must be so engaged.

It is suggested that the effect of the majority decision in this case is to introduce a new limitation on the meaning of this most difficult concept. It is true that a trade dispute need not necessarily be limited to disputes between individuals, and may equally be a dispute between a union and an employer, or between two unions.[9] The fact that a union is involved is, however, not conclusive; and a dispute which is not in its nature a trade dispute will not become one merely because a union chooses to assist one side or the other.[10] Moreover, although a mere personal quarrel

[9] *Conway* v. *Wade* [1909] A.C 506; *White* v. *Riley* [1921] 1 Ch. 1; *Brimelow* v. *Casson* [1924] 1 Ch. 302; *Riordan* v. *Butler* [1940] I.R. 347.

[10] *Larkin* v. *Long* [1915] A.C. 814, *per* Lord Parker at 833, Lord Parmoor at 845, 846.

is not enough to constitute a trade dispute,[11] the statutory protection afforded to the dispute may later be extended to persons who were not originally within its ambit, but who have subsequently become involved in it.[12] Nevertheless, there must have been a dispute at some stage,[13] although, as Lord Shaw put it in *Conway* v. *Wade*,[14] "such a dispute, although originally founded, it may be, on personal animosity, may develop into a situation in which sides are taken, and may develop into a situation of a general aspect, containing the characteristics of a trade dispute. . . ."

If the reasoning and authority of this Irish case are to be accepted, there are now two types of industrial situation which are outside the protection of the Trade Disputes Act, 1906: (a) The dispute between employer and employer. This was not dealt with by the Act, and it has been held that such a dispute is outside its scope.[15] (b) The dispute between an employer and a union whose members do not consist in "workmen" within the statutory meaning of that term. The possibility of there being such a dispute had been mentioned in the earlier cases,[16] but the question had never been decided, and there were dicta which appeared to be rather against such a proposition.[17] "Trade unions" are referred to throughout the 1906 Act, and in sections 2 and 4 they are quite clearly envisaged as a distinct entity.[18] Notwithstanding this, in section 5 (3), a trade union is not mentioned as a possible party to a trade dispute, though there are express references to "employers," "workmen," and to the elusive "any person." This appears to reinforce the argument against there being such a valid "employer *v.* union" dispute, such as that suggested by the defendants in *Smith* v. *Beirne and Others*.

Parliamentary History of the 1906 Act

Finally, in view of the wide interpretation placed on section 5 (3) of the Trade Disputes Act, 1906, by O'Daly J., and his suggestion that the legislature may have intended a wider meaning to be given to it, it is interesting to look at the statute's parliamentary history. In the Commons, on the Report Stage of the Bill,[19] the

[11] *Conway* v. *Wade* (*supra*), *per* Lord Loreburn L.C. at 510; *Barton* v. *Harten* [1925] 2 I.R. 37, *per* Molony L.C.J. at 41; *Bent's Brewery & Co., Ltd.* v. *Hogan* [1945] 2 All E.R. 570, *per* Lynskey J.

[12] *Dallimore* v. *Williams and Jesson* (*supra*).

[13] *Larkin* v. *Long* (*supra*), *per* Lord Parmoor at 845.

[14] [1909] A.C. 506, 520.

[15] *Larkin* v. *Long* (*supra*); *Conway* v. *Wade* [1908] 2 K.B. 844, 850, *per* Cozens-Hardy M.R. But the fact that employers may be concerned in a trade dispute on the side of employees does not affect it: *Brimelow* v. *Casson* (*supra*).

[16] *Larkin* v. *Long* (*supra*), *per* Lord Parker at 832; *Sherriff* v. *McMullen and Others* [1952] I.R. 236, 262, *per* Murnaghan J.

[17] *Fowler* v. *Kibble* [1922] 1 Ch. 140, 487; *R.* v. *National Arbitration Tribunal* [1943] 2 All E.R. 633; *Ryan* v. *Cooke and Quinn* [1938] I.R. 372.

[18] s. 2 (1): "It shall be lawful for one or more persons, acting . . . on behalf of a trade"; s. 4 (1): "An action against a trade union . . ."; s. 4 (2): ". . . In respect of any tortious act committed by or on behalf of the union. . . ."

[19] *Hansard* (4th series), Vol. 164, col. 232 (November 5, 1906).

Attorney-General, Sir John Walton, moved to insert section 5 (3) as an amendment. In doing so, he said that " it had over and over again been observed that the Bill as it stood would enormously increase the range of trade disputes and would even include disputes between traders. They were all agreed that trade disputes should be limited to those concerned with questions of employment and conditions of employment. He used the word ' person ' in the definition . . . as there were some persons by whom unions were formed who might not come within the term ' workman.' *The word should be wide enough to cover every person employed in any trade, business or industry.*" [20] This seems to bear out the views of Kingsmill Moore J. (*supra*), but it hardly supports those of O'Daly J. that employment in a trade or industry is not an essential prerequisite to a trade dispute.

On the other hand, when the Bill reached the Lords,[21] Earl Russell moved an amendment to provide in section 5 (3) that the words " workmen or body of workmen " should be substituted for " any person," on the ground that, as it stood, the section included domestic servants, which he did not think were intended to be included. This is of some interest, in view of the fact that, in *Smith* v. *Beirne and Others*, it was held that the barmen, being engaged in service of a domestic nature, could not be regarded as being employed in trade or industry.[22] The Lord Chancellor, Lord Loreburn, rejected this amendment, however, saying: " I do not see why domestic servants should not be allowed to strike under the law as anyone else. . . . Our view is not that this Bill should be restricted. . . . We think that if a strike is legitimate with one set of people, a strike is equally legitimate with others, provided it complies with the law."

Conclusion

Despite this difference of view, it must be said that the decision of the Irish Supreme Court is in accordance with the principle, expressed by Lord Parker (in an Irish appeal),[23] that the Trade Disputes Act, 1906, is not to be given a wider meaning than is necessary, so as to unduly extend its immunity, lest the common law rights of other persons be unreasonably curtailed. That this attitude has found recent support is to be seen from the case of *The National Association of Local Government Officers* v. *Bolton Corporation*,[24] in which the House of Lords had to consider the

[20] The italics are the author's.
[21] *Hansard* (4th series), Vol. 167, col. 376 (December 12, 1906).
[22] *Per* Kingsmill Moore J.: " The domestic element is less pronounced in the service of a barman in a workman's club than in that of a butler in the Junior Carlton Club. It might be safer to refer to the barmen as engaged in semi-domestic service, but it seems clear that they cannot be regarded as being employed in trade or industry."
[23] *Larkin* v. *Long* [1915] A.C. 814, 832.
[24] [1943] A.C. 166.

extended definition of "a workman" contained in the Industrial Courts Act, 1919.[25] That definition is an extremely wide one, but Lord Wright suggested that it must be subject to some control: "Workman means anyone, male or female, who works under a contract with an employer, subject, no doubt, to the general scope of the legislation. For instance, a lady's maid may be an exception. Her contract is, at least prima facie, outside the legislation in question, which is dealing with collective bargaining, trade practices, and so forth, and the avoidance of strikes and lock-outs."[26] It is suggested that the extension of this disability to other employees of a domestic or quasi-domestic nature, envisaged in *Smith* v. *Beirne and Others*, is a sound one, and should be followed when the matter falls to be decided here.[27]

V. T. H. Delany.*

[25] s. 8: ". . . Any person who has entered into or works under a contract with an employer, whether the contract be by way of manual labour, clerical work, or otherwise, be expressed or implied, oral or in writing, and whether it be a contract of service or of apprenticeship or a contract personally to execute any work or labour." *Cf.* Conditions of Employment and National Arbitration Order, 1940 (S.R. & O. 1940, No. 1305), r. 7.

[26] [1943] A.C. 166, at 186.

[27] As was pointed out by Kingsmill Moore J. in *Smith* v. *Beirne and Others*: "Even trade unions . . . have apparently accepted the view that the definition does not extend to cover persons in domestic service. The varied and essentially personal nature of such service is not adapted to regulations designed to secure uniformity of conditions, such as trade unions aim at enforcing."

* M.A., LL.D. (DUBL.), Lecturer in Law, Queen's University of Belfast.

REDUCTION OF DAMAGES FOR CONTRIBUTORY NEGLIGENCE

The Law Reform (Contributory Negligence) Act, 1945, provides that the damages of a plaintiff guilty of contributory negligence "shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."[1] In this article I propose to consider the mode by which, in a case of contributory negligence, the appropriate amount of the reduction is determined.

Basis of Apportionment

It is generally said that the effect of the Act is that damages should be apportioned between the parties on the basis of comparative culpability,[2] subject to the qualification that no fault should be taken into account which did not contribute to the accident.[3] On this view, the court should assess the comparative blameworthiness of the parties and apportion the damages accordingly. This view is, however, open to serious objection.

In the first place, it does not seem to allow for the fact that liability in the law of tort frequently arises without any moral culpability on the part of the defendant. What is the effect of contributory negligence on the part of the plaintiff in an action of strict liability, such as breach of statutory duty or under the *scienter* rule, when the defendant has not in fact been negligent? If damages are to be apportioned on the basis of comparative culpability, the slightest degree of contributory negligence will in effect defeat the

[1] s. 1 (1).

[2] Williams, *Joint Torts and Contributory Negligence*, para. 98. Writing in 1950, the learned author was of the opinion that in all the cases reported up to that time the basis of apportionment had been assumed to be fault or blame (*op. cit.*, p. 390); S. Chapman (1948) 64 L.Q.R. 26; Winfield, *Law of Tort*, 6th ed., p. 516; Salmond, *Torts*, 11th ed., p. 533, note (d); *Davies* v. *Swan Motor Co.* [1949] 2 K.B. 291, at 326, *per* Denning L.J.

Cf. the Admiralty rule: "The liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault" (Maritime Conventions Act, 1911, s. 1 (1)). Evershed M.R. has expressed the hope that there will be no divergence of principle in the application of the two contributory negligence Acts: "in substance the intention of the two Acts is the same, so that similar principles should be applied in the same way"; *Davies* v. *Swan Motor Co.* [1949] 2 K.B. 291, at 319.

But the authorities are not unanimous. Charlesworth, *Negligence*, 2nd ed., p. 495, and Landon (Pollock, *Torts*, 15th ed., p. 352) think that damages should be apportioned on the basis of causation, not fault. But they do not explain how degrees of causation can possibly be assessed. The difficulties in the way of accepting this view are discussed below.

[3] See *Jones* v. *Livox Quarries* [1952] 2 Q.B. 608.

plaintiff's claim entirely, since the plaintiff is the only one to whom any blame can be imputed.[4] But is this really the true policy of the Act?

Denning J. (as he then was) in *Lavender* v. *Diamints, Ltd.*[5] thought it was. The plaintiff in that case, an independent window cleaner, fell through the asbestos roof of the defendants' factory while engaged in cleaning their windows. He sued the defendants, alleging breach of their common law duty to him as an invitee and also breach of their statutory duty under the Factories Act to provide him with safe access to his place of work. The learned judge held that the common law claim failed, but that the defendants were in breach of their statutory duty. He held, however, that the plaintiff had been guilty of contributory negligence. On the question of the amount by which the plaintiff's damages should be reduced, he thought that the task of deciding what was his share in the responsibility for the damage was similar to that involved in a claim for contribution by one tortfeasor against another under the Law Reform (Married Women and Tortfeasors) Act, 1935. In an earlier case[6] under the last Act he had ordered a negligent tortfeasor to indemnify completely another tortfeasor who was strictly liable without fault, on the ground that the latter was not to blame. Accordingly, in the case before him, interpreting the two Acts on parallel lines, he thought that, since the defendants had not been negligent, the plaintiff's share in the responsibility for his injuries was "for all practical purposes" the whole responsibility, and so he awarded him no damages. His judgment was reversed by the Court of Appeal on the ground that there was no evidence of contributory negligence on the part of the plaintiff.[7] It was therefore unnecessary for the court to express any opinion on the reasoning which led Denning J. to deny him any damages.[8]

We are not here concerned with the true basis of apportionment under the Act of 1935.[9] It should, however, be pointed out that

[4] It is noteworthy that in Admiralty law, where the basis of apportionment is degree of fault, strict liability is practically unknown: Marsden, *Collisions at Sea*, 10th ed., p. 4.

[5] [1948] 2 All E.R. 249.

[6] *Whitby* v. *Burt Boulton & Hayward Ltd.* [1947] K.B. 918; followed in *Hosking* v. *De Havilland Co., Ltd.* [1949] 1 All E.R. 540.

[7] [1949] 1 K.B. 585.

[8] There is however some suggestion in the judgment of Singleton L.J. that he found difficulty in understanding how the defendants could properly be acquitted entirely of responsibility once it had been held that they had broken their statutory duty and that the breach was a cause of the plaintiff's injuries: [1949] 1 K.B. 585, at 596.

[9] The Act provides that in any proceedings for contribution brought by one tortfeasor against another the amount recoverable from any person "shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage" [s. 6 (2)]. The court may exempt any person from liability to contribute or order a complete indemnity (*ibid.*)

The general view is that the basis of apportionment under the Act is culpability: Williams, *op. cit.*, para. 44, Winfield, *op. cit.*, p. 209; Salmond, *op. cit.*, p. 93. A contrary view, that the basis of apportionment is

though the wording of the two Acts is closely similar, it is not safe to assume that the basis of apportionment under both Acts is the same. Different issues are involved. Under the Act of 1935, the court has to decide in what proportions the damages awarded to a plaintiff should be borne, as between themselves, by two or more persons who are liable severally for the same damage. In such a situation there is much to be said for the view that a negligent tortfeasor should indemnify completely another tortfeasor who is strictly liable without fault. But under the Contributory Negligence Act, the court has to decide by what amount the damages of a plaintiff, who but for contributory neligence would recover completely, should be reduced on account of his negligent disregard for his own safety. The objection to apportioning damages in such a situation on the basis of fault can be demonstrated by the following problem. Two workmen in a factory, A and B, while engaged in moving a piece of machinery, step backwards into an open and unfenced shaft and suffer injury. Both knew of the existence of the shaft, and each was guilty of the same disregard for his own safety in stepping into it. A is employed by the owner of the factory, while B is employed by an independent contractor who has undertaken to service the machinery. Both A and B sue the owner and occupier of the factory, who is held liable to A for breach of his common law duty to provide safe premises for his servants, but, on the authority of *London Graving Dock Co.* v. *Horton*,[10] not liable to B, his invitee, on the ground of the latter's knowledge of the danger. The defendant is, however, held liable to B for breach of statutory duty to fence the shaft. In the result, therefore, he is liable to both, though on different grounds. A's damages are reduced by half on the ground that he and the occupier were equally to blame for his injuries. Since A and B would, but for contributory negligence, recover in full, and since each did in fact show the same disregard for his own safety in stepping into the shaft, one might reasonably suppose that their claims will be reduced by the same amount. But this will not be so if the basis of apportionment is comparative culpability and the reasoning of Denning J. in *Lavender* v. *Diamints, Ltd.*[11] is accepted, for B's position in the above problem is indistinguishable from that of the plaintiff in that

causation, was adopted by Hilbery J. in *Smith* v. *Bray* (1939) 56 T.L.R. 200 and *Collins* v. *Hertfordshire C. C.* [1947] K.B. 598, and is supported by Charlesworth, *Negligence*, 2nd ed., p. 586 and Landon (Pollock, *Torts*, 15th ed., p. 149). In *Weaver* v. *Commercial Process Co.* (1947) 63 T.L.R. 466, however, Hallett J. held that apportionment should be on the basis of culpability, and this view is implicit in most of the apportionments actually recorded in the cases. See Chapman (1948) L.Q.R. 26. It seems that a claim by a master for contribution or an indemnity from a servant, for whose tort he has been held vicariously liable, is now governed by the Act of 1935: *Ryan* v. *Fildes* [1938] 3 All E.R. 517; *Jones* v. *Manchester Corporation* [1952] 2 Q.B. 852; *Semtex Ltd.* v. *Gladstone* [1954] 1 W.L.R. 945.

[10] [1951] A.C. 737.

[11] [1948] 2 All E.R. 249.

case, and so he will be awarded no damages. Such a solution does not commend itself as either logical or just.

It is submitted that the only feasible way of determining the appropriate amount of the reduction in a case of contributory negligence, whether in an action of negligence or one of strict liability, is to ignore the basis of the defendant's liability and to have regard solely to the extent of the plaintiff's departure from the norm of the reasonable man. It may be argued that there is some support for this view in the actual words of the Act, for the court is not expressly required to apportion damages at all. The Act provides that the plaintiff's damages " shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage." [12] It is true that the Act speaks of the claimant's " share of the responsibility," which, it may be urged, implies an apportionment of responsibility. But the answer to this objection is that the defendant's responsibility is established by the fact of his tortious liability, whatever the basis of it. His share of the responsibility is therefore all except that which is properly attributable to the plaintiff by reason of his failure to take care of himself. The responsibility of the defendant is the ordinary legal responsibility which arises from the fact that a tort has been committed, while the responsibility of the plaintiff is both moral and legal, since the legal effects of contributory negligence follow only from morally culpable conduct. It is only when the defendant's liability is based on moral fault that the responsibilities of the plaintiff and defendant are commensurable. Where the defendant's liability is strict, and he has not in fact been negligent, there is no common standard by which the responsibilities of the plaintiff and defendant can be measured or compared, and so the alternatives are either to deny the responsibility of the defendant altogether, as Denning J. did in *Lavender* v. *Diamints, Ltd.*[13] or, as I have suggested, to ignore the basis of the defendant's liability as irrelevant and to have regard solely to the plaintiff's conduct in determining what his share of the responsibility is. The last alternative would seem clearly preferable.

Further, the recent case of *Jones* v. *Richards* [13a] shows that where two or more tortfeasors are sued in respect of the same damage, it may be impracticable to reduce damages for contributory negligence other than on the basis suggested in this article. The plaintiff in that case had been injured by a threshing machine owned by his employers while it was being operated to thresh corn for a farmer. He sued both his employers and the farmer for damages, alleging breach of common law duty by his employers and breach of statutory duty under the Threshing Machines Act,

[12] s. 1 (1).
[13] [1948] 2 All E.R. 249.
[13a] [1955] 1 All E.R. 463.

1878, by both his employers and the farmer. Barry J. held the employers liable on both heads of the plaintiff's claim. The farmer, too, was held liable to the plaintiff, the learned judge holding that though he had not been at fault, nevertheless, on a proper construction of the Act, he was liable to the plaintiff for breach of statutory duty since the machine was at the time being worked for his benefit. The plaintiff's damages were reduced by one-third on the ground of his contributory negligence. On the question of contribution between the defendants, the learned judge ordered the employers to indemnify the farmer completely on the ground that the farmer was in no way to blame for the plaintiff's injuries. The amount of the reduction for contributory negligence was fixed without any reference to the different bases of the defendants' liability. As regards the plaintiff's claim against the farmer, the basis of the learned judge's reduction of his damages by one-third cannot have been the comparative culpability of the parties, since that basis must have led him to deny the plaintiff any damages at all, as Denning J. did in *Lavender* v. *Diamints, Ltd.* Comparative culpability was, however, the basis of the apportionment between the defendants. Though this involves that the two apportionment Acts were not construed on parallel lines, as Denning J. thought desirable, it is difficult to see how comparative culpability can provide a basis for reducing damages in cases like *Jones* v. *Richards*. One's mind boggles at the complications that would result if a claim against two or more tortfeasors in respect of the same damage were reduced by proportions varying with the basis of each tortfeasor's liability.

It is really, when one reflects upon it, an extraordinary suggestion that the absence of moral fault in a defendant in an action of strict liability should, if the plaintiff has been guilty of the slightest contributory negligence, excuse him completely. If, it may be asked, proof of moral fault is not necessary to establish liability, what can be the relevance of the absence of fault on the part of the defendant where a plaintiff has contributed partly to his injuries by his own negligence? If liability is strict, fault is irrelevant, and should remain so even when the plaintiff has been guilty of contributory negligence.[14] The view that the basis of apportionment

[14] Different considerations apply in a claim for contribution by one tortfeasor against another, where the plaintiff has got his damages and it is merely a question of the proportion of those damages to be borne by each tortfeasor. But even here there is something to be said for the view that a person who has been shown to have committed a tort against the plaintiff, even though it be one of strict liability, should not be granted a complete indemnity against a negligent tortfeasor. In *Daniel* v. *Rickett Cockerell & Co.* [1938] 2 K.B. 322 Hilbery J. refused to grant a complete indemnity in such a case, and his decision was followed by the Court of Appeal in *Wilkinson* v. *Rea, Ltd.* [1941] 1 K.B. 688. More recently, in *Dooley* v. *Cammell Laird, Ltd.* [1951] 1 Lloyd's Rep. 271, Donovan J. expressed the opinion that in such a situation it would not be right to allow a defendant strictly liable without fault to go scot free. In a true case of vicarious liability however the courts seem to be prepared to grant an indemnity:

should be comparative culpability, even in an action of strict liability, would seem to be based at bottom on the notion that there is in some way something reprehensible and anomalous in the existence of strict liability in the law of tort. Those who, consciously or unconsciously, hold this view and would have the law of tort give compensation only for immoral conduct, frequently overlook the fact that the morality of law is deduced from its judgments, and that it may often be just, according to general public sentiment, to hold a man liable for damage which he has brought about, though he was not in any sense morally at fault in what he did. Many factors other than moral quality of the defendant's conduct determine the justice of a judgment. The rule in *Rylands* v. *Fletcher* [15] is no less just than that in *Donoghue* v. *Stevenson*.[16] All tortious liability, whatever its basis, must be accepted as just. Therefore, once his liability is established, the moral quality of the defendant's conduct should not be relevant to the amount by which a plaintiff's damages are reduced on account of contributory negligence.

Actions for breach of statutory duty are so common these days that one would expect to find further authority on the point we are considering. But, except by Denning J. in *Lavender* v. *Diamints, Ltd.*,[17] the point does not appear to have been considered at all. There are a number of cases in the reports where the courts have apportioned damages for contributory negligence in actions for breach of statutory duty, but in all except two the defendants were negligent as well, so that an apportionment could be, and apparently was, based on the comparative culpability of the parties.[18] The only case, apart from the decision of Barry J. in *Jones* v. *Richards*,[18a] where damages have been apportioned after an express finding that the defendant had not been negligent is *Beal* v. *E. Gomme, Ltd.*[19] The plaintiff was an experienced workman who had suffered injury through failure to adjust the guard of a wood-working machine, and was seeking to recover damages from the defendants, his employers. The Court of Appeal held that the defendants had not failed to exercise proper supervision over the plaintiff's work and so were not liable in negligence for breach of their common law duty to him. But they were, the Court held, liable to him for breach of statutory duty, the fact of the guard not being adjusted at the time constituting a breach by them of the

see *Semtex, Ltd.* v. *Gladstone* [1954] 1 W.L.R. 945. In *Daniel's* case (*supra*) it was held that liability for the acts of an independent contractor is not true vicarious liability.

15 (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330.

16 [1932] A.C. 562.

17 [1948] 2 All E.R. 249.

18 See *Cakebread* v. *Hopping Bros.* [1947] K.B. 641; *Lloyds Bank* v. *Railway Executive* [1952] 1 All E.R. 1248; *Cork* v. *Kirby Maclean* [1952] 2 All E.R. 402.

18a [1955] 1 All E.R. 463.

19 (1949) 65 T.L.R. 543.

Woodworking Machinery Regulations. Having held that the plaintiff had been guilty of contributory negligence, the court did not, as it must have done had Denning J.'s reasoning been adopted, deny him all his damages, but reduced his claim by 80 per cent. Unfortunately, however, the decision cannot be cited with any confidence as supporting the view we have put forward, since Tucker L.J.[20] sought to justify the award of part of his damages to the plaintiff on the ground that the defendants must have known that their workmen did not always adjust their guards properly and had never actually reprimanded anyone for failing to do so. This reasoning is, however, difficult to reconcile with the express finding that the defendants had not been negligent.[21]

Contributory Negligence and Causation

Before leaving this topic one should perhaps refer to the connection between the defence of contributory negligence and a complete denial of causation. It has long been recognised that it is not sufficient in an action for breach of statutory duty merely to show that the defendant was in breach of his statutory duty: "it must be shown that the accident was causally associated with the breach of statutory duty."[22] The cases seem to show that in actions of this sort, though contributory negligence and denial of causation are regarded as distinct defences, the difference between them is one of degree rather than kind.[23] If a workman deliberately thrusts his hand into an unguarded machine, his employer's breach of statutory duty in not fencing it, though scientifically a condition *sine qua non* of the plaintiff's injuries, is nevertheless not a legal cause of them. In a case of gross negligence on the part of a plaintiff opinions may differ. One judge may regard the plaintiff's negligence as so great and culpable as to sever completely any causal connection between

[20] At p. 546.

[21] *Cf. Gatehouse* v. *John Summers Ltd.* [1953] 1 W.L.R. 742, where Pearson J. reduced the plaintiff's damages by 25 per cent. on account of his contributory negligence after holding that the defendants, though not guilty of negligence, were guilty of breach of strict statutory duty. The Court of Appeal held that the defendants had been negligent as well and dismissed their appeal, but without altering the trial judge's apportionment. In *Smith* v. *Chesterfield Co-operative Society Ltd.* [1953] 1 W.L.R. 370 the plaintiff's damages, in an action for breach of statutory duty, were reduced by 60 per cent. on account of contributory negligence; but though there was no express finding of negligence on the part of the defendants it is clear that the court did not entirely acquit them of blame.

[22] *Caswell* v. *Powell Duffryn Collieries, Ltd.* [1940] A.C. 152, at 168, *per* Lord Macmillan. Munkman, *Employer's Liability*, 2nd ed., pp. 366 *et seq.*

[23] Before the passing of the Contributory Negligence Act, it mattered little to a plaintiff on which ground he failed, since both had the effect of defeating his claim completely. The distinction is now of vital importance. In *Lewis* v. *Denye* [1940] A.C. 921, decided before the Act, where the plaintiff had been guilty of most culpable disregard for his own safety, the House of Lords held that the defendant's breach of statutory duty was not a cause of the plaintiff's injuries. On the same facts today the court would probably reduce the plaintiff's damages for contributory negligence.

the plaintiff's injuries and the defendant's breach of statutory duty, while another may regard it as simply an instance of gross contributory negligence, calling for an 80 or 90 per cent. reduction of damages. This point is mentioned here because in two recent cases where the plaintiff had shown gross disregard for his own safety the Court of Appeal denied altogether any causal connection between the plaintiff's injuries and the defendant's breach of statutory duty.[24] Though one of these decisions [25] may perhaps be criticised for unduly restricting the scope of the defence of contributory negligence, neither provides any support for the view that the basis of apportionment in cases of contributory negligence is comparative culpability. In each case the plaintiff was denied damages, not because the breach of statutory duty by the defendant, though a cause of the accident, was free from blame, but because the defendant's breach of duty was not a cause of the accident at all. The plaintiffs failed because their gross disregard for their own safety severed the causal connection between their injuries and the defendants' breach of duty.[26] The grossness of their negligence was the vital factor. On Denning J.'s view, however, the slightest degree of contributory negligence on the part of a plaintiff would have the effect of defeating his claim entirely, since, whatever the degree of his negligence, the whole blame would be his.

Apportionment where Both Parties are Morally at Fault

Where, in an action of tort, both parties have been guilty of moral fault, culpability does, as we have seen, provide a common standard by which the relative responsibilities of the parties can be assessed. In the great majority of cases, where fault is in fact present on both sides, comparative culpability as the basis of apportionment seems in the main to yield satisfactory results. But even when fault is present on both sides, there are strong arguments, apart from the desirability of having a single method of determining the reduction

[24] *Manwaring* v. *Billington* [1952] 2 All E.R. 747; *Norris* v. *W. Moss & Son Ltd.* [1954] 1 W.L.R. 346. See also the decision of Pilcher J. in *Johnson* v. *Croggan & Co. Ltd.* [1954] 1 W.L.R. 195.

[25] *Norris* v. *W. Moss & Son Ltd.* [1954] 1 W.L.R. 346.

[26] The courts are understandably reluctant to allow a plaintiff to recover any damages for a breach of statutory duty by the defendant brought about by the plaintiff's own negligence or wilful disregard of instructions, such as where an experienced and properly supervised workman fails to adjust a properly constructed guard on a machine and is injured, and the fact that the guard is not adjusted constitutes a breach of statutory duty on the part of his employers. One means of defeating the plaintiff in such a situation is by the doctrine of delegation, formulated by the Court of Appeal in *Smith* v. *Baveystock (A) & Co., Ltd.* [1945] 1 All E.R. 531, but this difficult doctrine is likely, in view of the criticisms of the Court of Appeal in *Manwaring* v. *Billington* [1952] 2 All E.R. 747 and what was said by the House of Lords in *National Coal Board* v. *England* [1954] 2 W.L.R. 400 regarding the maxim *ex turpi causa*, to be superseded by a simple denial of causation in cases where the court wishes to defeat the plaintiff entirely.

in all cases, for ignoring the basis of the defendant's liability and the extent of his fault in deciding what reduction should be made.

Consider, for example, the situation in the recent case of *Stapley* v. *Gypsum Mines, Ltd.*[27] Two miners of equal status, S. and D., employed in the defendants' gypsum mine, were ordered to bring down a dangerous roof before going on with their jobs. For half an hour they tried to do so with picks, but failed, whereupon, without resorting to either of the two other alternative methods of bringing down a dangerous roof, they decided to disregard the foreman's instructions and resume work. D.'s work took him to a nearby twitten, while S. resumed work in the stope underneath the roof which they had been ordered to bring down. Some time later the roof collapsed and S. was killed. His widow claimed damages from the defendants under the Fatal Accidents Act, alleging negligence and breach of statutory duty. Sellers J. held that S.'s injuries had been caused by the negligence of both S. and D. in failing to obey the order given to them, and so, the two men being of equal status and the defendants being vicariously liable for the negligence of their servant D., he awarded the widow damages reduced by 50 per cent.[28]

The Court of Appeal unanimously reversed his judgment, holding that the defendants were not liable at all, though the members of the court differed widely in their reasons for coming to this conclusion.[29] Singleton L.J. held that the claim in negligence was barred by the fact that the arrangement between S. and D. to carry on with their work without bringing the roof down absolved D. from any duty of care towards S., while any claim for breach of statutory duty was defeated by the rule in *Smith* v. *Baveystock & Co., Ltd.*[30] Birkett L.J. pointed out that had S. alone disobeyed an order such as was given to S. and D., his claim would certainly have failed under the rule in *Smith* v. *Baveystock*. The fact that the order had been given to and disobeyed by two men could not, he thought, make the employers liable. He also held, as an alternative ground of decision, that the effective cause of S.'s death was his own negligence in resuming work under the dangerous roof. Morris L.J., the third member of the court, while agreeing with his brethren on the application of the rule in *Smith* v. *Baveystock*, held that the plaintiff's claim also failed because the duty imposed on S. and D. had been a joint one with the result that S. "could not point to any omission or dereliction on Dale's part which was not fully and wholly his own, and, accordingly he could not assert that Dale had caused his injuries."[31]

[27] [1953] A.C. 663.
[28] His judgment is not reported, but it is discussed in the judgments of the Court of Appeal: [1952] 2 Q.B. 575.
[29] [1952] 2 Q.B. 575.
[30] [1945] 1 All E.R. 531.
[31] [1952] 2 Q.B. 575, at 600.

The House of Lords, by a majority of three to two, reversed the decision of the Court of Appeal, and held the defendants liable, but only to the extent of 20 per cent. of the plaintiff's damages.[32] The majority held that D.'s failure to persevere in trying to bring down the roof or report again to the foreman was a contributory cause of S.'s death for which the defendants were responsible. We are not here concerned with the reasons which led their Lordships to this conclusion. The interest of the case for our purposes lies in the reasons given for reducing the plaintiff's damages by 80 per cent., rather than, as Sellers J. did, by half.

The effective decision on this matter was made by Lords Reid and Tucker, since Lord Oaksey, the third member of the majority, was inclined to agree with the apportionment of Sellers J., but was not prepared to dissent from his colleagues.[33] Lord Reid justified the reduction on the ground that S. "contributed to the accident much more directly than Dale." "A court must," he said,[34] "deal broadly with the problem of apportionment and in considering what is just and equitable must have regard to the blameworthiness of each party, but 'the claimant's share in the responsibility for the damage' cannot, I think, be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness. It may be that in this case Dale was not much less to blame than Stapley, but Stapley's conduct in entering the stope contributed more immediately to the accident than anything that Dale did or failed to do." Lord Tucker, on the other hand, preferred to justify the reduction on the ground that S. had been more to blame than D. He pointed out that though they were equally to blame up to the time when they decided to give up trying to bring down the roof, "Stapley alone acted in contravention of regulation 7 (3) by entering and working in the stope which had not been made secure. He must, I think, consequently bear a much larger share of responsibility than the respondents."[35]

Though the degree of the reduction strikes one as fair in the circumstances, neither of these explanations can, with respect to their Lordships, be accepted as satisfactory. So far as Lord Reid's reasoning is concerned, it is difficult to see how one of two causes can be said, except in terms of culpability, to be more immediate than the other. Natural science does not measure the potency of physical causes. The law is concerned with physical causation only in order to determine and distribute legal responsibility, and the attribution of greater immediacy to one of two causes is necessarily

32 [1953] A.C. 663, *per* Lord Oaksey, Lord Reid and Lord Tucker, Lord Porter and Lord Asquith of Bishopstone dissenting.

33 Lord Porter and Lord Asquith, though of the opinion that the defendants were not liable at all, agreed that 80 per cent. would have been an appropriate reduction had the need for apportionment arisen.

34 [1953] A.C. 663, at 682.

35 At 685.

based on a conscious or unconscious assessment of what responsibility should be.[36]

Nor is Lord Tucker's explanation any more satisfying, for it implies that had D.'s duties kept him in the stope with S. with the result that both had been killed, the damages of each widow would have been reduced by only 50 per cent. It would also seem to imply that if ten miners of equal status agree to continue their work beneath a dangerous roof after failing to bring it down in accordance with express instructions, and all are killed in consequence, the claim of each widow would be reduced by only 10 per cent. on the reasoning that all ten were equally to blame and therefore the employers must answer in each claim for the aliquot faults of the other nine miners. In truth, it is reasonably clear that 20 per cent. was the proportion which Lords Reid and Tucker thought D.'s widow should fairly recover, and there is little doubt that this assessment was not in fact dependent on such factors as the number of miners involved or the fact that D.'s duties took him elsewhere.

It will be seen that by adopting the mode of reducing damages which we have suggested no difficulty at all would be experienced in justifying the reduction actually decided on in *Stapley's* case. The 80 per cent. reduction would then be attributed to the extent of the departure of S. from the norm of the reasonable man, irrespective of the basis of the defendants' liability or the number of other miners involved.

There is some support for this view in the decision of Gerrard J. in *Connor* v. *Port of Liverpool Stevedoring Co.*,[37] decided a short while after the decision of the House of Lords in *Stapley* v. *Gypsum Mines, Ltd.*[38] The situation was not unlike that in *Stapley's* case. The plaintiff, a dock labourer, and his mate were employed in unloading cartons from the hold of a ship by means of board-slings. The task of the two men was to load cartons on the slings which were then lifted out of the hold. Through the negligence of both a carton fell from a loaded sling and injured the plaintiff. He sued the defendants, his employers, citing the negligence of his mate, and it was argued on his behalf that since he and his mate were equally to blame for the accident he should be awarded half his damages. Gerrard J. rejected this contention. "It is," he said, "rather like a case of two men pulling negligently on the supports of a scaffolding above their heads and bringing it down upon themselves and then one of them claims damages. It seems to me that it would be quite absurd to say that the one who is claiming damages could say, 'Oh, my pal is 50 per cent. to blame. It was not all my fault. My employers are to blame 50 per cent.'

[36] "Causation itself is difficult enough; degrees of causation would really be a nightmare": S. Chapman (1948) 64 L.Q.R. 26, at 28.
[37] [1953] 2 Lloyd's Rep. 604.
[38] [1953] A.C. 663.

I think the share of responsibility of a man who contributes as this man did, negligently, to his own injury in circumstances of this kind is a very difficult one to calculate: it is quite impossible to make any sort of mathematical adjustment. I think the section [section one of the Act] demands that I should do what is fair, and I think it is just and equitable, having regard to the plaintiff's share of responsibility, that he should bear 75 per cent." [39]

So, if two young men in sports cars collide and suffer injuries while racing each other on the highway, the mere fact that *vis-à-vis* an innocent bystander who is injured also they are equally to blame should not entail that, in actions against each other, each will recover half his damages. While equally responsible for the bystander's injuries, as between themselves each might well be held 80 per cent. responsible for his own injuries. In the type of situation we are considering, the comparative responsibility of the wrongdoing parties has to be considered in relation to each separate claim: it cannot be determined once and for all, irrespective of who is claiming. As between themselves the two motorists might conceivably be held to have consented to the risk of injury so as to exclude completely any remedy, but this could not affect their equal shares of responsibility for the bystander's injuries.

DOUGLAS PAYNE.*

[39] [1953] 2 Lloyd's Rep. 604, at 608.

* Lecturer in Law at University College, London.

COLONIAL COURTS AND THE DOCTRINE OF JUDICIAL PRECEDENT

Introductory

One of the inevitable consequences of British rule over dependent territories is the introduction into them of English law at the same time as an existing local law is recognised within limits. In certain cases one finds express provisions in colonial legislation stating the dates from which English law applies to particular territories. The usual clause runs something like this: the principles of English common law, the doctrines of equity and statutes of general application, which are in force in England on a given date, shall apply to this colony (or protectorate or territory, as the case may be). Thus, to take a few random examples: in the case of Bermuda [1] the date is July 11, 1612; of Northern Rhodesia,[2] August 17, 1911; of Hong Kong,[3] April 5, 1843; of British Columbia,[4] November 19, 1858; of the Gold Coast and the old Lagos Colony,[5] January 24, 1874; of Fiji,[6] January 2, 1875; of Gibraltar,[7] December 31, 1883; of Uganda,[8] August 11, 1902, and of Nigeria,[9] January 1, 1900.

It follows from this operation of English law in the colonies that fundamental doctrines based upon it should also apply therein unless specifically excluded either by clear legislation or on the ground that local circumstances render their adoption impracticable. As it is, the all-important doctrine of judicial precedent, with which we are here concerned, is such a corner-stone of any legal system based on case-law that it automatically applies in all British colonies, protectorates and trust territories, all of which take the English legal system for their model. Even those colonies [10] which

[1] See Colonial Reports: Bermuda, for 1951 and 1952, p. 36.
[2] Courts Ordinance, Cap. 3 of 1953 Revised Edition of the Laws, s. 11.
[3] Supreme Court Ordinance No. 12 of 1873.
[4] Supreme Court Ordinance No. 7 of 1867.
[5] Supreme Court Ordinance No. 4 of 1876.
[6] Supreme Court Ordinance No. 14 of 1875.
[7] Order in Council of Feb. 2, 1884, Cl. 2.
[8] Order in Council of 1902 and Report for 1952, p. 69.
[9] Supreme Court Ordinance, Cap. 211 of 1948 edition of the Laws, s. 17.
[10] *e.g.*, Mauritius, a French colony, was surrendered to Great Britain in 1810 on the condition that the inhabitants retain their religion, laws and customs; accordingly, the French Code has prevailed there in civil cases: *Re Adam*, 1 Moo.P.C.C. 460, at p. 470. Again, in British Guiana, the Roman-Dutch law governed civil matters till 1917: *McDermott* v. *Judges of British Guiana*, L.R. 2 P.C. 341. Similarly, Spanish law which was in force in Trinidad in 1797 when the island was captured by Great Britain, remained operative in the colony: *Escalier* v. *Escalier*, L.R. 10 App.Cas. 312. Of course, in every case, the specific limits of these permitted laws have had to be fixed by subsequent local legislation.

were formerly administered by other European Powers before coming under British rule and which were allowed to retain the (foreign) laws already established there conform to the pattern of judiciary law in the rest of the colonies.

But legal theory apart, the existence in every British colony of a system of hierarchically graded courts necessarily involves a chain of appellate jurisdictions,[11] with varying degrees of authority in their judicial pronouncements.

Hierarchy of Colonial Courts

Since the more detailed considerations we are about to give to the principle of judicial precedent within the framework of colonial law will unavoidably revolve round the existing organisations of courts in the several colonies, it seems expedient to attempt a summary account of these here.

Now, in every colony there is a Supreme Court, which is the highest court for the territory. It consists of two parts, a Divisional Court and a Full Court (as in the West African colonies), or a High Court and a Court of Appeal (as in several other colonies such as Jamaica, Singapore and Kenya), or simply a High Court (as in Uganda and Northern Rhodesia). Whenever the Supreme Court is split into two parts there is a right of appeal from the Divisional or High Court to the Full Court or Court of Appeal. Sometimes one finds, as in Singapore, a separate Court of Appeal for criminal cases in addition to the Supreme Court whose appellate jurisdiction is then limited to the hearing of only civil cases from the lower courts. The Singapore Court of Criminal Appeal is of co-ordinate appellate status with the Supreme Court section of Court of Appeal, and appeals therefore lie from it, as from this Civil Court of Appeal, to the Judicial Committee of the Privy Council.[12]

Next below the Supreme or High Court are graded categories of Magistrates' Courts. Sometimes these are styled Subordinate Courts [13] of the 1st, 2nd, 3rd or even 4th Class, corresponding respectively to the courts of the Provincial Commissioner or Resident Magistrate, District Commissioner, District Officer and Cadet Administrative Officer.[14] Appeals lie in the reverse order of these courts, that is, from the lowest to the highest; thereafter, to the Supreme Court. Elsewhere, the nomenclature may be more straightforward in that the courts are just named Magistrates' Courts, Grades I, II and III, respectively, only Grade I appointees

[11] *Per* Lord Stowell in *Ruding* v. *Smith* (2 Hagg Const.Rep. 37, at p. 382): ". . . a colony subject to British rule and sovereignty is governed by the general principles of administration of the law including appellate jurisdiction."

[12] See Caps. 10 and 11 of the Laws of Singapore; also, Singapore Annual Report for 1952, p. 190.

[13] Kenya Courts Ordinance, Cap. 3 of 1948; Laws of Sarawak, 1947 edition of the Laws, Vol. 1, Cap. 3, s. 2, with appellate jurisdiction defined in s. 13.

[14] Laws of Northern Rhodesia, Cap. 3 of 1953 edition of the Laws.

being duly qualified lawyers, Grade II being District Officers and Grade III laymen disposing of petty cases. This is the general pattern in West Africa.

Also, it must be remembered that nearly all colonial legal systems have a two-tier judicial set-up: there is the British-established system of courts applying mainly English law or what local adaptations and modifications have made of it; and there is the indigenous system of traditional courts applying mainly customary law or such part of it as is not considered to be repugnant to the principles of "natural justice, equity and good conscience" or inconsistent with any validly applicable law in the colony. The two systems sometimes run in separate but parallel systems [15] for most of their respective courses; very often, however, they run into each other at a confluence or even confluences.[16] There are, however, three ways in which the two systems are not to be regarded as being in watertight compartments:

(a) Many of the customary courts are truly traditional as having existed for centuries, though often later reorganised under British rule; but a good many more have been established by the British Administration, usually along traditional or supposedly traditional lines;

(b) Almost invariably, there are arrangements for the remitting or transferring of decisions of these Native (or Local) Courts to the Magistrates' Courts, which thereby enjoy wide powers of review of such decisions—all these being modes of indirect appeals from the former to the latter;

(c) Certain species of causes of action, such as land tenure, customary marriage, inheritance and succession, and testamentary dispositions, are expressly excluded from the original jurisdiction of the Magistrates' and Supreme Courts, both of which, however, have appellate jurisdiction in these matters. Therefore, once one of these categories of customary law matters enters the British-established system at the Magistrates' Court stage, it forms part of the latter for the purpose of the doctrine of judicial precedent.

Besides, the customary courts of certain colonies are also hierarchically graded; *e.g.*, in Nigeria there are four Grades [17]:

[15] *e.g.*, in Tanganyika the customary court system previously had no connection whatsoever with the High Court of the Territory. (See Native Courts Ordinance, 1929, which, however, left the Liwalis' Courts under the control of the High Court.) But even these courts were taken away by the Subordinate Courts Ordinance of 1941 and classed with other Native Courts (*vide Journal of African Administration*, Vol. IV, No. 1, p. 17). Indeed, the decision of the High Court in *Kassambara* v. *R.* [1940] Tanganyika Law Reports, Vol. 5, p. 48, was that there was no provision in any Ordinance or other law for any appeal from Liwalis' Courts to the High Court. This remained the position up to 1950. (See next footnote.)

[16] The Tanganyika Local Courts Ordinance No. 14 of 1951 has now integrated the customary court system with that of the High Court.

[17] Native Courts Ordinance, 1933, and later amendments.

A, B, C and D, the Grade A court being the highest and the D, the lowest. Similar grading occurs in the Gold Coast.[18] In Sarawak, the Native Courts Ordinance[19] provides for Headman's Courts, Native Officers' or Chiefs' Courts and District Native Courts from which an appeal lies to the Resident's Courts or Courts of Magistrates of the First Class.[20] Both the Buganda Courts Ordinance and the Native Courts Ordinance of 1940 describe three classes of Native Courts: a Central or Principal Court for each administrative division under the Kabaka or the Mukama, Saza or County Chiefs' Courts, and the Gombolola or Sub-County Chiefs' Courts; there are, at the lowest level, also the Miruka Chiefs' Petty Domestic Tribunals which often act in the villages as agents of the Gombolola or Saza Courts. In Kenya, the Courts Ordinance[21] lists under Subordinate Courts these three Muslim Courts: Courts of the Liwalis, Cadis, and Mudirs, in descending order of importance, while the African Courts Ordinance[22] makes separate provisions for the African customary courts. This duplication is avoided in Northern Nigeria by the uniform grading system for all types of local courts as already outlined above.[23]

Finally, there are also "Area" Courts or Native Courts of Appeal which serve a number of contiguous communities as joint Appeal Courts. Appeals lie from these to the Magistrates' Courts, or the Supreme Courts, as the case may be.

Normally, appeals lie from the least of colonial statutory Courts of Record to the Supreme or High Court, from which further appeals lie direct to the Judicial Committee of the Privy Council in the United Kingdom. This holds good for all colonies whether it has been so provided either in the Order in Council constituting the various courts or in some local enactment, usually the Supreme Court Ordinance. It does not matter whether the Supreme Court is unitary or federal, as is the case in the present Federation of Malaya or in the new Central African Federation.

There are, however, three special arrangements that should be mentioned in this connection. The direct chain of appeal from the Supreme or High Court to the Privy Council is broken where there exist regional supra-colonial judicial bodies like the West African Court of Appeal (serving the colonies of Nigeria, the Gold Coast, Sierra Leone and the Gambia), the Court of Appeal for Eastern Africa (serving Kenya, Uganda, Tanganyika and Zanzibar[24]

[18] See K. A. Korsah's *Report of Commission on Native Courts* (Govt. Printing Dept., 1951), paras. 35, 68–9.
[19] Cap. 4, s. 3 of the 1947 Revised Edition of the Laws.
[20] *Ibid.*, s. 8.
[21] Cap. 3 of 1948 edition of the Laws, s. 2.
[22] Of 1951, which replaces the Native Tribunals Ordinance of 1930.
[23] Quite understandably, the West Indian colonies have no system of Native or Customary Courts; the place of these is taken by Petty Sessional Courts. There is no body of customary law, as such.

and, formerly, also Nyasaland until 1947), and the Rhodesia and Nyasaland Court of Appeal [25] (serving the central African territories of Northern Rhodesia, Southern Rhodesia and Nyasaland up to the establishment of the new Central African Federation). In all these cases, as well as in the West Indian Court of Appeal,[26] appeals naturally lie from the individual Supreme or High Court of each constituent territory to the regional Appeal Court [27] in the first instance, and thereafter to Her Majesty's Judicial Committee of the Privy Council.

It is said that, even if no Order in Council or local legislation in a particular colony provides for appeals to the Privy Council, it is an established Royal Prerogative of the Crown to receive appeals from colonial courts through the Judicial Committee,[28] with the exception of cases coming within section 478 of the Merchant Shipping Act, 1894, for which there is a right of appeal from colonial courts only to the High Court of Justice in England. But apart from this apparently solitary instance, the Judicial Committee of the Privy Council is the final court of appeal in England for the colonies, and no appeal therefrom to any other court in the United Kingdom will be entertained.[29]

It is necessary, however, to recall this caution given by Lord Atkin in the West African case of *Moore* v. *Tayee* [30]:

> " It is quite true that their Lordships, as every other court, attempt to do substantial justice and to avoid technicalities, but their Lordships, like any other court, are bound by the

[24] Zanzibar has just come under the East African Court of Appeal, for the Zanzibar Order in Council, No. 636 of 1952 (made under the Foreign Jurisdiction Act, 1890), provides for appeals from the High Court for Zanzibar to the E.A.C.A. in both civil and criminal matters and for the determination by that court of any questions of law reserved and cases stated by a judge of the Zanzibar High Court.

[25] Cap. 5 of the 1951 edition of the Laws of Northern Rhodesia.

[26] Serving Trinidad, Tobago, the Windward Islands, Leeward Islands, British Guiana and Barbados.

[27] It is not an invariable rule that appeals lie in the first place to a regional, supra-colonial Court of Appeal from the Supreme or High Court of the constituent territories. A local colonial enactment may make an exception to the general rule: thus, an appeal from a Provincial Commissioner's Court of the Gold Coast, made direct to itself, was upheld by the West African Court of Appeal in *Darko* v. *Agyakwa* (1943) 9 W.A.C.A. 154.

[28] 3 & 4 Will. 4, c. 41, s. 2. Accordingly, the Privy Council can hear appeals from mandated (now trust) territories: *Jerusalem & Jaffa District Governor* v. *S. Murra* [1926] A.C. 321; from protectorates: *Sobhuza II* v. *Miller* [1926] A.C. 518; even from *foreign* countries, by treaty: *Hart* v. *Gumpach* (1873) L.R. 4 P.C. 439, an appeal from the Supreme Court of China and Japan under the Treaty of Tientsin. See also *Att.-Gen. of Ceylon* v. *Perera* [1953] 2 W.L.R. 238

[29] Thus, in *Henderson* v. *H.*, 3 Hare 100 (*cf. Smith* v. *Moffatt*, L.R. 1 Eq. 397), the Court of Chancery in England refused to grant an injunction to an appellant from the Supreme Court of Newfoundland (then a colony) against a decree of that court, insisting that the only competent court to deal with the case was the Privy Council.

[30] 2 W.A.C.A. 43, in the course of his Privy Council judgment in the case.

statute law, and if the statute law says there shall be no jurisdiction in a certain event, and that event has occurred, then it is impossible for their Lordships or any other court to have jurisdiction."

Quaere: whether *Cushing* v. *Dupuy*[31] is still good law in so far as it held that an appeal could nevertheless be entertained by the Privy Council as a matter of grace even where a local enactment expressly made the decisions of a colonial Supreme Court final in matters of insolvency?

Colonial Application of Stare Decisis

The English theory of judicial precedent is that a decision of a judge, once given, on a question of law binds both that judge himself and subsequent judges in lower courts to decide the same question in a similar manner.[32] But any judgment of any court is authoritative only as to that part of it, called the *ratio decidendi*, which is the principle considered to form the real basis of the decision in question. *Obiter dicta* have no binding force and their authority varies with the personal standing of the judge who pronounced them.

In accordance with these principles, the House of Lords is the final Court of Appeal in both civil and criminal cases from all courts in England, Wales, Scotland and Northern Ireland. Its decisions bind the Court of Appeal and the Court of Criminal Appeal as well as all other subordinate courts.[33] Decisions of English superior courts from the House of Lords downwards are *authoritative* precedents but those of foreign superior courts, like the American Supreme Court, or even Commonwealth Supreme Courts, have only a *persuasive* authority in English courts.[34]

As applied to colonial law the doctrine of judicial precedent means that decisions of the Judicial Committee of the Privy Council bind all colonial courts of whatever status or jurisdiction, *e.g.*, the West African Court of Appeal, the East African Court of Appeal, the Court of Appeal for Rhodesia and Nyasaland (now the Federal Supreme Court for the Central African Federation) and all colonial Supreme or High Courts; that the decisions of the Full or Appeal Courts bind the Divisional or High Courts; that the decisions of the latter bind the Magistrates' Courts, whose decisions again are binding as between their higher and lower grades; and that Magistrates' Courts' decisions bind all Customary or Native Courts, the decisions of the appellate grades of which bind the lower ones according to a definite hierarchy.

[31] (1880) 5 App.Cas. 409.
[32] Hanbury, *English Courts of Law*, 1949 impression, p. 24.
[33] See the Appellate Jurisdiction Act, 1876, and the Criminal Appeal Act, 1907.
[34] Salmond, *Jurisprudence*, 10th ed., pp. 194 *et seq*. The foregoing is necessarily too brief a statement of a complicated subject, but it will suffice for our purpose here.

There has been some uncertainty concerning the extent to which the Privy Council was bound by its own prior decisions.[35] But in *Attorney-General of Ontario* v. *Canada Temperance Federation*,[36] it was held that the Judicial Committee is not bound by its own previous judgments, except perhaps those involving points of constitutional law. It has also been held that its decisions do not bind the House of Lords [37] and, on principle, lower English courts.[38]

It seems well settled that findings of the Judicial Committee bind the West African Court of Appeal, as witness this pointed dictum in the Nigerian case of *Thomas & Ors.* v. *Ademola II* [39]:

> " Colonial courts must give precedence to the decisions of the Privy Council before those of any other tribunal. It is apparent that part of the judgment of the West African Court of Appeal in *Aminu Jinadu & Ors.* v. *Salami Akiyele* (W.A. C.A., January, 1944, unreported) which dealt with the construction of the said subsection (2) is at variance with the Privy Council's decision in *Laoye & Ors.* v. *Amao Ojetunde*, and cannot be followed." [40]

It seems that Privy Council judgments will be followed by any of the regional Appellate Courts we have described,[41] even if such judgments are based upon cases coming from other parts of the Commonwealth, so long as the subject-matter is governed by the same principle of law. Thus, in the recent case of *Fatuma Binti Mohammed Bin Salim Bakhshuwen* v. *Mohammed Bin Bakhshuwen*,[42] the Judicial Committee strongly warned against the assumption that its judgments in a series of cases from India on points of Mohammedan law were confined to that law as applied or administered in India. Their Lordships stressed that, on a question of Mohammedan law, which is the same in East Africa as in India, the judgments of the Privy Council in appeals from India must be taken as binding on the East African Court of Appeal.[43]

There does not seem to be any direct authority on the point whether either the West or the East African Court of Appeal is bound by its own previous decisions, but it looks on the whole as if each has been acting on some such assumption.[44] It is, however,

[35] See, *e.g.*, *Mercantile Bank of India* v. *Central Bank* [1938] A.C. 287; *Risdale* v. *Clifton*, 2 P.D. 306, at p. 307; Holland, *Jurisprudence*, 10th ed., p. 70.
[36] (1946) 62 T.L.R. 199.
[37] *Victorian Railway Commissioners* v. *Coultas* (1887) 13 App.Cas. 222.
[38] See, *e.g.*, *Leask* v. *Scott*, 2 Q.B.D. 380; *Dulieu* v. *White* [1901] 2 K.B. 669.
[39] (1945) 18 N.L.R. 12, at p. 23.
[40] The same principle was upheld in the Nyasaland case of *Kachinga* v. *R.* [1946] E.A.C.A., Vol. V of Nyasaland Law Reports, p. 82 (Case No. 40/1946).
[41] See pp. 359–61, *supra*.
[42] [1952] A.C. 1, P.C.
[43] It is possible to deduce that this proposition of *stare decisis* put forward in the preceding paragraph applies generally to all colonial courts with lesser jurisdiction than have these regional Appellate Courts.
[44] See, *e.g.*, *Dossani* v. *R.* (1946) E.A.C.A. No. 77/1946, Vol. IV, Nyasaland Law Reports, p. 85. Also in *Robin* v. *R.* (Nyasaland Law Reports, Vol. III, at p. 34), the E.A.C.A. followed its own prior decision in *R.* v. *Amkeyo*, 7 E.A.L.R. 14.

clear that judgments of the Appeal Court will bind the three (now *four*, including Zanzibar) constituent Supreme (or High) Courts whose jurisdiction is subordinate to its own, but only, it would seem, if the principle involved in such Appeal Court decisions is the same as that raised in the particular inferior court of any of the four territories: "That case (*i.e.*, *Kamunan* v. *R.*[45]) is an authority for the order made, as although *a Uganda case* the section of Criminal Procedure Code under which the order was made is in the same terms as the section of the Nyasaland Procedure Code under which the order for re-trial was made."

But while it is fairly clear that decisions of the Privy Council on matters of appeal from the West African Court of Appeal that raise identical legal issues will be binding on the East African Court of Appeal, it is by no means certain whether, if at all, decisions of the one regional Appeal Court bind the other. It is not stated anywhere that both have any kind of connection except *via* the Privy Council decisions in the circumstances just envisaged; perhaps it is not unreasonable to suppose that each has an appellate jurisdiction which is co-ordinate with that of the other. If so, the decisions of the one will not be binding on the other, and the most that can be said is that the judgments of each are only of *persuasive* authority with the other. The position would appear to be the same as regards the extent to which decisions of either the W.A.C.A. or the E.A.C.A. carry any weight with the respective Supreme or High Courts subject to their authority.

One other point of some importance is to determine the relative judicial competence of these regional supra-colonial Appellate Courts in the hierarchy of colonial courts generally, or even *vis-à-vis* English courts. Some light would seem to be thrown on this question by a consideration of section 13 of the Rhodesia and Nyasaland Court of Appeal Ordinance,[46] which says that, where there is no provision in the ordinance itself or in the rules of court or in any other valid local law, the jurisdiction vested in the Court of Appeal shall be exercised "as nearly as may be in conformity with the law and practice for the time being observed in England by the Court of Criminal Appeal and the Court of Appeal, respectively." No similar reference occurs in the Ordinance establishing the West African Court of Appeal. But, assuming that the same analogy holds for it as for the East African Court of Appeal, it is not possible to derive from such provision any categorical assertion of jurisdictional equality among all three.[47]

It remains to add that the decisions of a regional Appeal Court bind all the courts subordinate to it, with the result that any judgment of a lower court that is inconsistent with such decisions will

[45] 11 E.A.C.A. 122.
[46] Cap. 5 of the 1951 edition of the Laws of Northern Rhodesia.
[47] With the other problems that this provision in the Northern Rhodesia Ordinance raises we shall deal below, at pp. 366 *et seq.*

be to that extent of no effect. Thus, Johnson J. held in the Nyasaland High Court case of *R.* v. *Ziyaya*[48]: "I am bound by the rulings of the Court of Appeal (*i.e.*, for East Africa) and must respectfully differ from those of Haythorne Reed J. (*sic*, in *R.* v. *Chimombo*, High Court Case No. 102 of 1930)." The principle embodied in this passage is of universal application in all colonial areas with a system of regional Appellate Courts.

We now come to the colonial Supreme Courts. Where a Supreme Court consists of a Full Court (or Court of Appeal) and a Divisional Court (or High Court), it is clear that the decisions of the former bind the latter in each colony. On principle the authority of the territorial court of final appeal ought to be supreme within its own sphere and, in the absence of express legislation on the basis of full reciprocity, none of the Supreme Courts under the aegis of a regional Court of Appeal can bind any of the others. And this must be so, notwithstanding the fact that, as in West Africa, the constituent Supreme Court Ordinances grant to the judges of one another's Supreme Courts a high *locus standi* in the respective compositions of those courts,[49] at least in theory.

It must be for these reasons that the West African Court of Appeal had to rule expressly in *Netherlands Distillery* v. *J. H. Henkes' Distillery*[50] that the decisions of the Full Court of Appeal (*i.e.*, the higher branch of the Supreme Court) of Nigeria are not binding on the Divisional Court of the Gold Coast or on the West African Court of Appeal itself. It follows, of course, that (1) one Supreme Court's decision cannot bind *any* branch of another Supreme Court or even a lower court in any area covered by the same regional Appeal Court and (2) that, *a fortiori*, one colonial Supreme Court's judgment can at most have only a persuasive authority with another Supreme Court where there is no form of judicial link through a regional Court of Appeal. The weight of authority that the courts of one colony would attach to the decisions of another must depend on (a) the identity of the subject-matter or of the applicable principle of law involved in the instant case, (b) the fact the particular decision of the Supreme Court in question has been embodied in a Privy Council decision as of general application in colonial law, and (c) the intangible factor of the experience and reputation of the judge or panel of judges who gave the judgment

[48] (1935) High Court (Cr.) Case No. 134, Vol. IV of Nyasaland Law Reports, p. 54, at p. 56. The same principle was upheld in *R.* v. *Sikisi*, High Ct. (Cr.) Case No. 8/1936, Vol. IV, Nys.L.R., at pp. 73–4.

[49] The usual clause is, as in s. 4 of the Gold Coast Supreme Court Ordinance, that the Chief Justices of Nigeria, Sierra Leone and the Gambia shall be *ex officio* judges of the Gold Coast Supreme Court. Reciprocal provisions exist in the similar Ordinances of these other colonies.

[50] (1935) 2 W.A.C.A. 358, at p. 359.

to be applied.[51] None of these considerations except (b) is by itself conclusive.

It does not seem to have been expressly decided whether a colonial Supreme Court or a Division of it regards itself as bound by its own prior decisions, but it is reasonable to suppose that it will follow the now established practice of the Court of Appeal as well as of the Divisional Court in England to regard its own previous decisions as binding, subject, of course, to the three excepted instances recognised in English law.[52] What is not yet clear, however, is whether colonial High Court judges would, since they have both common law and equity jurisdiction, follow the example of judges of the Queen's Bench Division in England who do not so easily dissent from one another's previous judgments as do Chancery judges of co-ordinate jurisdiction.[53]

Just as a Supreme or High Court's decisions bind all Magistrates' Courts under its sway, so those of Magistrates' Courts bind all Customary or Native Courts of Appeal as well as all courts inferior to these, except on matters of strict local law and custom. In this respect, it may happen that, contrary to the normal principle that a high court's judgments bind a lower, the process is reversed so that the tail wags the dog. On matters of customary law, Magistrates' Courts or even the Supreme Court ought to follow an established decision of even the lowest Native Court if (i) it is the only one available on the point and (ii) it is not barbarous or otherwise against natural justice or any valid local law. Thus it has been held by the West African Court of Appeal that the decisions of Native Courts on matters within their special knowledge should not be lightly disregarded by the appropriate Supreme Court.[54]

We thus have the interesting situation according to which the highest court of a colony (or even the Privy Council) may find itself bound in practice by a decision of one of its lowest courts.

[51] It is but natural that a judge who has served in the courts of more than one colony tends to apply legal principles laid down in one colonial court to similar cases coming before him in another. Identical or analogous sections of statutes are similarly treated.

[52] It has recently been laid down in *Young* v. *Bristol Aeroplane Co.* [1944] K.B. 718, that the Court of Appeal is bound by its own previous decisions, subject to these three exceptions: (1) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow; (2) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords; (3) The court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam*, *e.g.*, where a statute or a rule having statutory effect which would have affected the decision was not brought to the attention of the earlier court. The Divisional Court, that is, two or more judges of the Queen's (or King's) Bench Division of the High Court, has also been held to be bound by its own previous decisions: *Police Authority for Huddersfield* v. *Watson* [1947] K.B. 842.

[53] See *Re Hillas-Drake* [1944] Ch. 235; though Mr. Justice Bennett in *Zetland* v. *Driver* [1937] Ch., at pp. 660–1, does not agree that this is so.

[54] *Dinsey & Ors.* v. *Wayoe* (1939) 5 W.A.C.A. 177.

How Far English Decisions Bind Colonial Courts

Let us preface our remarks here with a brief discussion of the relative position of colonial courts to more or less equivalent English courts, with a view to discovering the binding character, if any, of the latter's decisions upon the former.

We have seen that decisions of the Judicial Committee are in strict theory not absolutely binding upon English courts from the House of Lords downwards, although these are loth to dissent from the Council's judgments in proper cases. It must be remembered, however, that the Privy Council's decisions on matters of Prize law and Ecclesiastical law are, by the very fact that it is the only final court of appeal in these spheres, binding on all English courts.

It seems to follow that English decisions on all fours with those of the Privy Council in Prize, Ecclesiastical, Mercantile or Admiralty law might be binding on colonial courts as do Privy Council ones.

The Privy Council can also render English decisions absolutely binding on colonial courts by using them as *rationes decidendi* of its own judgments: as when it applied the House of Lords decision of *Andrews* v. *Director of Public Prosecutions* [55] (a case of criminal negligence) to the recent case of *Dabholkar* v. *R.*,[56] an appeal from the High Court of Tanganyika; or the English Court of Appeal decision in *Boguslawski* v. *Gdynia Ameryka Linie* [57] to the appeal case from Hong Kong, *Civil Air Transport, Inc.* v. *Central Air Transport Corporation*.[58] Innumerable other instances, both earlier and later than these, could be cited to the same effect. All this is not to say that the colonial courts do not themselves follow relevant English decisions irrespective of whether or not these have been adopted by the Judicial Committee. We shall enlarge on this point presently.

Let us now consider the relational pattern of colonial courts to English courts. According to the various Supreme Court Ordinances [59] of the colonies as well as the Northern Rhodesia Ordinance,[60] it seems we are right in assuming that colonial Supreme Courts have co-ordinate jurisdiction with the High Court of Justice in England and that each of the West African Court of Appeal, the Rhodesia and Nyasaland Court of Appeal, and the East African Court of Appeal has co-ordinate jurisdiction with the English Court of Appeal and the Court of Criminal Appeal, respectively. But does this mean that only the decisions of the English Court of Appeal and of the Court of Criminal Appeal bind colonial Supreme Courts and that only the decisions of the House of

[55] [1937] A.C. 576.
[56] [1948] A.C. 221.
[57] [1950] 2 All E.R. 355.
[58] [1953] A.C. 70; [1952] T.L.R. 621.
[59] *e.g.*, Cap. 3 of 1953, s. 10 (Laws of N. Rhodesia).
[60] See p. 356, *supra*, for the reference.

Lords and of the Privy Council bind the W.A.C.A., the R.N.C.A. and the E.A.C.A.? We will take two judicial views on the matter.

In the first, the West African Court of Appeal held that decisions of the English Court of Appeal upon the same issue and between the same parties are binding on itself.[61] In the second, the East African Court of Appeal held as follows: "His attention was not drawn to the case of *Scott* v. *Pattison* [62] in which it was held that a contract of service was not enforceable by reason of the Statute of Frauds but that the plaintiff was entitled to sue in assumpsit upon an implied promise by the defendant to pay for the services rendered. *That case seems to us to be conclusive.*" [63] The one shows that on a point of English law the decision of even the English High Court binds a colonial, regional Court of Appeal, while the other seems to equate the decisions of the English Court of Appeal with those of a colonial Court of Appeal, provided there is identity of issue as of parties.

Nevertheless, in certain well defined situations, English High Court decisions would appear to hold their own against those of all colonial courts, *e.g.*,

(a) Only the High Court in England can hear appeals from colonial courts in matters governed by section 478 of the Merchant Shipping Act, 1894;

(b) The official misconduct of colonial Governors during their tenure of office in their territories is usually justiciable in the King's or Queen's Bench Division: *Phillips* v. *Eyre* [64];

(c) Decisions of the High Court in cases brought before it which involve general principles of colonial law; *e.g.*, *Terrell* v. *Secretary of State for the Colonies*.[65]

In all such cases, it seems that decisions of the English High Court will bind all colonial courts and that the circumstances would be exceptional in which the latter would feel free to dissent from such judgments.

Another point must be noticed. Where, as in Singapore,[66] the Supreme Court of a colony has appellate jurisdiction only in civil causes so that the criminal jurisdiction is vested in a separate Court of Criminal Appeal, is it right to assume that the powers of the latter are co-extensive with those of the English Court of Criminal Appeal? If so, the colonial Court of Criminal Appeal will not be bound by the decisions of their English namesake. In the case of Singapore, for example, appeals lie straight from both the Supreme Court and the Court of Criminal Appeal to the Judicial Committee

[61] *Concessions Enquiry* No. 939 (Accra), 1 W.A.C.A. 305.
[62] [1923] 2 K.B. 723.
[63] *Kitching* v. *Conforzi* [1938] E.A.C.A., No. 5 (Civil), Vol. IV, Nys.L.R. 104, at p. 104.
[64] (1870) 6 Q.B. 1.
[65] [1953] 2 Q.B. 482.
[66] See Caps. 10 and 11 of the Laws of Singapore.

of the Privy Council. It would, therefore, seem most likely that both courts are meant to be co-ordinate in jurisdiction, the split into civil and criminal being purely for administrative convenience. Hence, the status of such colonial Criminal Appeal Court may be that of the Supreme Court, whether of the same colony or elsewhere.

Where the colonial Supreme Court retains, however, the normal structure so that both the civil and the criminal jurisdictions are concentrated in the Full Court (or Court of Appeal, as the Full Court is styled in some colonies), the Colonial Supreme Court is perhaps spared the kind of controversy as to the exact hierarchical relation between the Court of Appeal and an independent Court of Criminal Appeal, which is still unsettled in English law. But the composite character of the colonial Supreme Court of this orthodox type may raise its own problems of *stare decisis*. For instance, it is well established here that appeals from the Prize jurisdiction of the English High Court (*i.e.*, Probate, Divorce and Admiralty Division) go only to the Judicial Committee; and so do those from the English Ecclesiastical Courts. Will appeals in similar matters lie from the Colonial Supreme Courts direct to the Privy Council, or *via* a regional Appeal Court, where there is one? [67] Again, will the decisions of a Supreme Court in a civil suit, in which strong comments on points of criminal law are made, bind the court in a subsequent criminal case? Will the court follow the example of English law and regard the point as still open, as is the position in this matter between the Court of Appeal and the Court of Criminal Appeal in England?

So far we have been examining the broad question as to the decisions of which English courts are binding on which colonial courts. We may now turn to a brief discussion of a vital issue. It will be recalled that we stated at the outset that the principles of English law, the doctrine of equity and the statutes of general application have been introduced into all British colonies at the various dates of their several establishment. The problem we want to tackle is: Given a particular date when English law became part of the law of a particular colony, which English decisions ought to bind the courts of that colony?

In order to put the matter into its proper perspective we will assume a convenient date, say, January 1, 1900, as that on which English law came into force in a colony.[68] It is clear that all English decisions of authority as at this date bind the courts of

[67] Almost all the Ordinances constituting these courts usually make their powers supreme over *all* local causes with, of course, the possibility of further appeals in the normal way.

[68] This is the case with Nigeria, according to the Supreme Court Ordinance, Cap. 211 of the 1948 edition of the Laws of Nigeria. The points involved here are of universal application, since only the relevant date for any other colony need be substituted for the Nigerian one in order to see the relevance of the issues here canvassed. It would complicate matters unduly to repeat here all the dates already given on p. 356.

the colony. But what about judicial decisions subsequent to 1900? Perhaps the relevant rules may be reduced into the following main propositions—

(A) Post-1900 English decisions will still apply—

(i) as long as they do not involve a change of any particular common law doctrine or principle: Thus, doctrines like Common Employment (laid down in *Priestley* v. *Fowler*[69]), Contributory Negligence, The King can do no Wrong, Strict Liability (under the rule in *Rylands* v. *Fletcher*[70]), and Frustration, to name only a few, will all still apply today in the courts of this colony. The English Act of 1948, which abolished the doctrine of Common Employment, has no extra-territorial application, nor have the Contributory Negligence Act, 1945, the Crown Proceedings Act, 1947, and the Law Reform (Frustrated Contracts) Act, 1943. To illustrate the last case further, we should say that while the doctrine of frustration of contracts of leases adumbrated in *Paradine* v. *Jane*[71] and consecrated in *Chandler* v. *Webster*[72] will still apply in this colony, even in their extended scope in *Fibrosa* v. *Fairbairn*,[73] the further change effected by the 1943 Act of Parliament and all English decisions based on it will not apply to this colony;

(ii) if the amending Act of Parliament itself or an Order in Council expressly extends the operation of the post-1900 enactments, or if a local Ordinance substantially adopts a corresponding section (or the whole) of a post-1900 English Act and the decision in question has been based thereon:

Thus, it has been held that English decisions upon Acts *in pari materia* are authorities for the interpretation of colonial enactments—*per* Dr. Lushington in *Catterall* v. *Sweetman*.[74] The same is the case where English statutes have been adopted by a colony without any alteration and the Court of Appeal has construed them in judicial decisions: *Trimble* v. *Hill*,[75] approved in *Hunt* v. *Fripp*.[76] The Privy Council recently decided in *Cooray* v. *R.*[77] that where a local enactment has been passed in the same terms as an English statute, the courts of the colony should

[69] (1837) 3 M. & W. 1.
[70] (1868) L.R. 3 H.L. 330.
[71] (1647) Aleyn 26.
[72] [1904] 1 K.B. 493.
[73] [1943] A.C. 32.
[74] (1845) 1 Rob.Ecc. 304, at 318.
[75] (1879) L.R. 5 App.Cas. 342, at 344.
[76] [1898] 1 Ch. 675.
[77] [1953] A.C. 407.

follow the construction put upon the words by the English courts.[78]

(iii) if a post-1900 decision of the Judicial Committee of the Privy Council embodies a post-1900 English decision or statute in a judgment of its own and its *ratio decidendi* is that of a general, as opposed to a particular, principle of law.

(B) Post-1900 English decisions will not apply—

(i) if they are based on a post-1900 English statute which alters an applicable pre-1900 principle of English common law or statute;

(ii) if they pertain to legal relations unknown to the local law of the colony, *e.g.*, rules of testate and intestate succession, marriage and the family, which are peculiar to English law and cannot possibly be said to be applicable to the local law on these subjects.

T. O. Elias.*

[78] See also the recent Maltese case of *Staines* v. *Victor La Rosa* [1933] 1 W.L.R. 474.

* B.A., LL.M., PH.D.; of the Inner Temple, Barrister-at-Law, Barrister and Solicitor of the Supreme Court of Nigeria; until recently Simon Senior Research Fellow, The University of Manchester.

THE JUS TERTII AND THE THIRD MAN

Mr. Atiyah has patently put much thought and labour into his re-examination of the *jus tertii*.[1] Two aspects of his article are, however, open to serious question. First, his assertion that the defence of *jus tertii* (strictly so called) to an action for the recovery of chattels does not exist. Secondly, his suggestion that if such a defence did exist, it would be possible for a defendant to plead *jus tertii* without establishing any particular person to be the true owner or repository of the right in question.

The first question resolves itself into a dispute as to the significance of *jus tertii*. Holdsworth is accused of confusing two types of case.[2] Firstly, Mr. Atiyah's *jus tertii* which is apparently only relevant "where the plaintiff has a better right to possession than the defendant but a third party has a better right than either of them."[3] Secondly, cases where "the plaintiff fails; not because a third party has the best right of all, but because the plaintiff himself has not a better right than the defendant."[4] This article adopts the second sense and submits that the true *jus tertii* is a means of effacing rather than overwhelming the plaintiff's allegation of a right to possession, and that it only concerns cases where the plaintiff fails *in limine* because the validity of his prima facie case is successfully impugned. The plaintiff alleges a right to possession, and the defendant defeats it not by confession and avoidance but by traverse.[5] The *jus* which the defendant puts forward is not something superior to the plaintiff's right yet compatible with it. It is something which by its very incompatibility disproves the plaintiff's right.[6] The essence of the true *jus tertii* is that it employs the technique of traverse. This clearly differentiates it from the bastard *jus tertii* to which a defendant must resort when the plaintiff alleges possession, and which operates by confessing the possession and avoiding it by alleging that the defendant *himself* has a superior right derived from a *jus tertii*.

Mr. Atiyah proceeds to term cases where the plaintiff has a right consistent with the *jus tertii* but overwhelmed by it as "the orthodox view" of this defence. The authority which he produces in favour of this "orthodox view" (before he explodes it) is

1 18 M.L.R. p. 97.
2 H.E.L., Vol. VII.
3 18 M.L.R. p. 100.
4 18 M.L.R. p. 100.
5 "The defendant can negative the title of the plaintiff, by proving that some third person is entitled to the property—by setting up, that is, a *jus tertii*." H.E.L., Vol. VII, p. 65.
6 It is submitted that only an incompatible title and not an absolute one is logically necessary—*cf.* H.E.L., Vol. VII, p. 425.

suprisingly weak. It seemingly consists solely of the judgment of Tindal C.J. in *Leake* v. *Loveday*.[7] The relevant passage is worthy of full citation.[8] "The action is trover to which the defendants have pleaded not guilty, and the plaintiff was possessed of the goods as his own property; and the question is, whether, under the latter plea, the title of third persons may be set up. It seems to me that from the very form of that plea, the plaintiff is called upon to prove the goods to be his property and that the defendants are let into any evidence which will show that such goods are not the plaintiff's." It is submitted that this is merely another way of saying that the defendant is let into any evidence which will traverse the plaintiff's initial allegation.

Mr. Atiyah unfortunately fails to refer to the subsequent case of *Richards* v. *Jenkins*[9] where Wills J. gives extensive consideration to the previous authorities, but unfortunately does not seem to have been referred to *Leake* v. *Loveday*.[10] *Richards* v. *Jenkins*[9] concerns an interpleader issue in which an execution creditor was held to be able to set up the title of a trustee in bankruptcy to defeat the claim of a bankrupt. After considering the authorities on *jus tertii*, Wills J. lucidly summarises his conclusions.[11] "The question only arises where there is a really *adverse* title in a third party which, if that third party chooses to assert it, must prevail over that of execution creditor and claimant alike, but where that third party takes no step and does not seek to enforce his superior title, the decision in this case is, and that in every one of those which we have discussed, has been, in substance a legitimate application of the maxim *potior est conditio defendentis*." In other words, the plaintiff has failed *in limine* because the defendant has proved a *jus tertii* incompatible with the plaintiff's alleged right. The plaintiff has not a better right than the defendant; he has no right at all. If this is the only legitimate application of the defence of *jus tertii*, Mr. Atiyah has done little more than dextrously destroy the creature of his own imagination.[12]

The things which are Mr. Atiyah's may be rendered unto him and he may be permitted, *inter alia*, to exercise the *jus abutendi* over them. However, a more serious protest must be entered when he swings the attack from subjective to objective and challenges the materiality of the third man. His difficulty appears in his

[7] (1842) 4 M. & G. 972.
[8] *Ibid.*, at 981.
[9] (1886) 17 Q.B.D. 544.
[10] *Supra*, n. 7.
[11] At p. 555.
[12] "It is difficult to see how the existence of a *jus tertii* could negative the right of a plaintiff to get back the possession of goods in which he had an older and therefore a better right to possession than the defendant. At any rate it never seems to have occurred to any lawyer that it would be a possible plea and this is perhaps the best evidence that it would have been inadmissible." H.E.L., Vol. VII, pp. 425–6.

penultimate footnote [13] where he states that he has found nothing in principle or authority to support the view that it is essential for the defendant who pleads *jus tertii* to establish some particular person to be the true owner. It is pertinent to take a practical approach and ask how *jus tertii* is to be pleaded or proved unless it is alleged that the *jus* in question is vested in some particular person. "*Jus tertii*" could not conceivably be pleaded in terms, and, if it was, would soon bring a demand for "Further and Better Particulars," for it is trite learning that a right cannot exist independently of a legal person and therefore it is impossible to prove the former without proof of the latter. Mr. Atiyah's researches into principle have not taken him far and it is difficult to think what better authorities he could have had on the question of pleading than Bullen and Leake [14] and Atkin.[15] The latter sets out the plea of *jus tertii* as follows:—

> "(1) The defendant denies that the plaintiff is or was at any material time the owner of or entitled to possession of the goods referred to in the Statement of Claim. The said goods were at all material times and are the property of *one G.H.* . . ."

Mr. Atiyah has conceived the *jus tertii* as a right in a third party, which can be pleaded without designating the third party and which is superior to but not incompatible with a right in the plaintiff. If such a defence existed it would patently be a potent one and Mr. Atiyah has been puzzled as to why it has not been pleaded in such cases of finding as *Hannah* v. *Peel*.[16] He has concluded that it would have been pleaded if it had existed and therefore the fact that it was not pleaded is strong evidence that a true defence of *jus tertii* does not exist. It is submitted that the answer is twofold. Firstly, the necessity of associating the *jus tertii* with some particular person makes it unlikely that a transferee from a finder would know who is that person when the finder himself does not know. Secondly, the fact that, partly due to this, *jus tertii* is a considerably more modest concept than imagined and is consequently confined to correspondingly rare factual premises. It may be suggested with diffidence and respect that perhaps Mr. Atiyah has fallen into the ever-present danger of an over-academic approach to a practical problem.

Anthony Jolly.*

[13] 18 M.L.R. p. 109.
[14] 9th ed., p. 960.
[15] *Encyclopaedia of Forms and Precedents in Civil Proceedings*, Vol. 15, p. 322.
[16] [1945] K.B. 509.
* Of the Inner Temple and the Northern Circuit, Barrister-at-Law.

REPORTS OF COMMITTEES

SECOND REPORT OF THE LAW REFORM COMMITTEE ON THE LAW OF INNKEEPERS' LIABILITIES FOR PROPERTY OF TRAVELLERS, GUESTS AND RESIDENTS. (Cmd. 9161; May 1954; 4d.)

A REVIEW of the law of innkeepers had, of recent years, become an urgent need and on that score alone this report would indeed be welcome. Its claim, however, to our further gratitude is due to its admirable conciseness in presenting the various problems and the recommendations it makes consequent upon the present anachronisms reflect a balanced view of the reforms needed. What is said hereafter, therefore, is for the most part by way of amplification and reinforcement of the views expressed in the report.

Definition of an inn

On this question the Committee appears to have been in two minds. Whilst recommending that any new legislation should contain a definition based on the existing common law meaning of the term, the Committee has been unable to suggest a definition for the guidance of any future Parliamentary draftsman and has, moreover, somewhat resiled from the view that a definition is needed by concluding that the difficulty of deciding whether or not any given establishment is an inn "is probably greater in theory than in practice, for it seems likely that the owner of premises whose status might be doubtful will have concluded the question against himself by exhibiting the statutory notice under the Act of 1863." With regard to the latter observation the Committee appears to have overlooked the decision in *Olley* v. *Marlborough Court Ltd.* ([1949] 1 K.B. 532). In that case a notice under the Act of 1863 had been exhibited in a conspicuous place in a "private residential hotel." The trial judge, Oliver J. ([1948] 1 All E.R. 955 at p. 956), without stating his reasons found that the hotel was not a common inn and the Court of Appeal were not disposed to disturb that finding, and as negligence had been clearly established it was indeed unnecessary for the court to decide whether the hotel was a common inn (see Singleton L.J. at p. 545). Bucknill L.J. (at p. 543), however, commented that the establishment in his opinion was a private residential hotel, at any rate more like a private hotel than a common inn. It would seem, therefore, that the display of the notice will not be conclusive of the matter; moreover, in these circumstances it would be more desirable to define what is an inn rather than to leave the matter in doubt so that a proprietor or owner would not have to speculate as to whether any notice he may display will be wholly effective.

With regard to the view that the difficulties incurred by the absence of a definition are more theoretical than practical, this is not wholly in accord with the true position. In *Lamond* v. *Richard & the Gordon Hotels Ltd.* ([1897] 1 Q.B. 541), for instance, Lord Esher M.R. (at p. 545) thought that it was open to argument whether the larger London hotels had not held themselves out as receiving customers according to the custom of England and might therefore not be common inns. Whether or not this view prevailed, it was not until *Gates* v. *Dorchester Hotel Ltd.* ((1953) *The Times*, March 7) that one such hotel was held to be a common inn. No doubt the owners by exhibiting a notice under the Act of 1863 fervently hoped that such was the case, but McNair J. in upholding their contention expressed no little surprise that the Dorchester Hotel should be regarded at law as a common inn. These factors, it is submitted, give credence to the contention that the matter is not without uncertainty. Is, for instance, a "motel," the newly acquired import from the American continent, which is beginning to take root in this country (see *The Times*, September 18, 1954) a common inn? The first thoughts of the Committee on this point, that in any legislation which may be drafted to give effect to the recommendations contained in the report an attempt should be made to define an inn, are, it is submitted, its better thoughts.

General recommendations

In accepting the suggestion that the common law liability of an innkeeper should remain, the Committee was thereby forced to consider to what extent the present absolute liability should be reduced. Apart from the need to curtail the innkeeper's rights to a lien in cases where it was recommended that he should only be liable for his negligence, the only increase in his liability concerned the Innkeepers' Liability Act, 1863. The Committee considered that that Act operated efficiently, and apart from reiterating the necessity for conspicuous exhibition of the notice—the courts themselves having affirmed this necessity (*Carey* v. *Long's Hotel Co. Ltd.* (1891) 7 T.L.R. 213)—dealt only with the amount of any liability. It recommended that the total amount of liability should be £100 and £50 in the case of any one article. This recommendation if implemented will no doubt affect insurance policies taken out by the owner, but this should in no way detract from the recommendation of the report.

Loss and Damage

In considering the proposition in Halsbury's *Laws of England* (2nd ed. Volume XVIII, p. 151) the Committee has noted that despite the unequivocal terms of section 1 of the Act of 1863, the view is widely held that an innkeeper is not liable for damage to a guest's goods as opposed to loss unless he has been negligent. This is based on the dictum of Swift J. in *Winkworth* v. *Raven*

([1931] 1 K.B. 652 at p. 660) in a case before the Divisional Court in which a guest's car had been damaged by frost while standing in an unheated garage which was open on one side. Macnaghten J. (at p. 662) decided the case on the narrower ground that an innkeeper's liability to supply accommodation is satisfied by providing accommodation which is reasonably fit for its purpose. The distinction introduced by Swift J. was unjustified and the Committee has recommended clarification of the matter, if indeed clarification is required, for in the Committee's view section 1 suffices. That the matter is not free from doubt is apparent from recent experience in the county courts (see *Bradley* v. *Stewart* [1954] 2 C.L. 182 [N.I.] County Court). It would appear necessary, therefore, to amend section 1 to clarify the point.

Motor Vehicles

Undoubtedly the most serious hardships—the Committee recognised that it is often only a battle between two insurance companies and can therefore scarcely be regarded as causing hardship, but merely an anachronism—are caused by the continuance of the innkeeper's absolute liability for the motor vehicles of his guest which are parked within the " hospitium " of the inn, the Act of 1863 expressly excluding " any carriage," which in the effluxion of time came to include motor vehicles, and in recent years the liability has become particularly burdensome especially in view of the combined effects of the rule and the wide definition given to a " traveller " (see particularly *Williams* v. *Linnitt* [1951] 1 K.B. 565). Indeed in many respects the harshness of the recent decisions has not fully manifested itself. In *Watson* v. *People's Refreshment House Association Ltd.* ([1952] 1 K.B. 318), for instance, Devlin J., without deciding the matter, doubted whether the liability extended to a motor coach although he was not certain. Similarly, in *Gresham* v. *Lyon* ([1954] 1 W.L.R. 1100), decided after the issue of the Committee's report, McNair J. drew a distinction between the liability for the motor-car and the luggage locked in the boot of the car, a distinction which in the present state of the law was, it is submitted, not justified. It will be necessary to advert to this hereunder.

Whilst the recommendation as to a redefining of a " traveller," which will exclude the local inhabitant who " drops in for a quick one " as in *Williams* v. *Linnitt*, would remove the more glaring examples of injustice, the Committee has felt it necessary to recommend a clean sweep and substitute liability only when the innkeeper has been negligent. Particularly as both parties are covered by insurance, this recommendation is heartily welcomed. A test of liability whereby it would be negligent if suitable accommodation were not provided would seem to give the requisite protection to the guest. As a corollary to this recommendation, the

innkeeper's lien will no longer attach to a motor vehicle (which, it is recommended, will include motor bicycles).

In view of these recommendations, it is clear that the distinction drawn by McNair J. in *Gresham* v. *Lyon* will no longer be necessary. The fact that the Committee based its recommendations concerning motor vehicles on the absence of effective control of such items as luggage locked in a car would similarly fall to be considered on the same basis as the car itself (see 70 L.Q.R. 450). As the law stands at present it is a little difficult to appreciate the reasoning of McNair J. in *Gresham* v. *Lyon*. Without considering the decision exhaustively, the dicta cited by the learned judge do not appear to support his view, for both dicta related only to the extent of the hospitium and whether the premises in question could be classed as "infra hospitium," and not the relationship of any car or luggage to the hospitium. Moreover, in view of the fact that only the defendant would have been insured there is little justification for an attempt in this instance to mollify the lot of innkeepers. The learned judge's second ground for deciding the case, that the plaintiffs themselves were negligent, is more acceptable but even then not unassailable.

Whilst the innkeeper's liability was absolute there was no scope for him to contract out of his liability unlike his more fortunate counterpart, the private hotel-keeper. With the recommendation that motor vehicles be removed from the sphere of absolute liability, it might not be inexpedient to counter this concession to some extent by prohibiting the innkeeper from exempting himself by contract. The province of innkeeping is such that the guest has little or no chance of contracting on an equal basis, and although the courts continue to construe exemption clauses strictly (see *White* v. *John Warwick & Co. Ltd.* [1953] 1 W.L.R. 1285, and *Adler* v. *Dickson* [1955] 1 Q.B. 158) it would be possible for innkeepers, by so framing the conditions under which they accepted the motor vehicle on to their premises (see *Ashby* v. *Tolhurst* [1937] 2 All E.R. 837; *Halbauer* v. *Brighton Corporation* [1954] 1 W.L.R. 1161), to extend the concession as recommended by the Committee to lengths which would not be in accord with the tenor of the whole report (*cf.*, section 8 of the Hire-Purchase Act, 1938).

Liability for person of guests

The terms of reference did not allow the Committee to consider a not unimportant matter in this branch of the law. The older and stricter view of liability is based on a decision of McCardie J. in *Maclenan* v. *Segar* ([1917] 2 K.B. 325) where it was laid down that the innkeeper warrants to his guests that the inn premises are as safe as reasonable care and skill on the part of anyone can make them. In *Bell* v. *Travco Hotels Ltd.* ([1953] 1 Q.B. 473) the Court

of Appeal distinguished *Maclenan* v. *Segar*, holding that, whilst McCardie J. may have been right in applying the higher standard of care to the interior of an hotel, such a test was not applicable to a drive a quarter of a mile long, and applied a less stringent test akin to that of invitor-invitee relationship. Whilst the distinction may be justified (see 69 L.Q.R. 155), it leaves the judgment of McCardie J. unchallenged. It is a pity, therefore, that the Committee was unable to consider this point and either affirm or dissent from McCardie J.'s view. It is interesting to note that the less stringent view prevails in the Canadian courts (see *Zawyrucha* v. *Red Lake Hotel Co. Ltd.* [1948] 1 D.L.R. 669).

Persons other than guests

Consideration might have been given to the position and status of a person who comes upon the inn premises either as a guest of a person staying at the inn or as a member of a party or club whose proceedings are being held on the inn premises. In view, however, of the recommendation of a redefinition of a " traveller " as one who comes to the inn to stay the night, it was perhaps superfluous to deal with these problems. If future legislation rejects the redefinition, problems of practical importance become highly pertinent.

Reports such as this one always have their intrinsic value; but admirable as they are their value is immeasurably enhanced when put to the use for which they are primarily intended. The importance of this report can hardly be over-emphasised, and it is to be hoped that like its predecessor it will shortly be considered and its recommendations embodied in a statute.

Addendum

A recent private members' Bill, entitled the Hotel Proprietors (Liabilities and Rights) Bill, which was designed to give effect with some modifications to the recommendations of the Committee, had its first reading in the House of Commons on March 3; subsequently, on four separate occasions, it failed to obtain the time of the House for a second reading.

The Bill's major concern, apart from the removal of the absolute liability for the guest's motor vehicle (Clause 2 (2)), was its attempt to tackle the problem of definition. This was achieved in a cumbrous and circumlocutory fashion. Clause 1 (1) stated that " a hotel within the meaning of this Act shall, and any other establishment shall not, be deemed to be an inn," and that the rights and liabilities that had hitherto attached to an innkeeper would henceforth be those of the proprietor of such a hotel. Clause 1 (3) defined a " hotel " as an establishment " held out by its proprietor as offering food, drink and, if so required, sleeping accommodation . . ."; yet the absolute liability, with the increased

financial limitations (as recommended by the Committee), would be in respect of loss of or damage to goods where sleeping accommodation had been engaged *and* the loss or damage had occurred during a time amply covering the period of occupation, such a period being that " for which the traveller was a guest at the hotel and accommodation so engaged." If liability is to be based on these conditions prevailing, it is difficult to comprehend the necessity of food and drink in the definition being the primary requisites. Should not " accommodation " be the prime factor in any definition?

Other points of interest in the Bill concern the removal of doubts over the distinction, that appears to be accepted, of " loss of " and " damage to " (Clause 1 (2)). Whilst the Act of 1863 was to be repealed, the provisions of section 1 of that Act were to be substantially re-enacted (Clause 1 (3)). Finally, the opening words of Clause 2 (1) and (2), dealing with his exemption from liability for " *any* property brought to the hotel " except in the instances enumerated in Clause 2 (1) (*a*) (*b*) and the exemption for motor vehicles, stated: " Without prejudice to any other liability . . ." The import of these words cannot be considered within the scope of this note.

L. J. BLOM-COOPER

NOTES OF CASES

"An Offence of a Political Character"

Political conditions behind the Iron Curtain were vividly brought to light when, in *Ex p. Kolczynski* [1955] 2 W.L.R. 116; [1955] 1 All E.R. 31, the Queen's Bench Divisional Court heard the application of seven Polish sailors for writs of habeas corpus. The seven, who had been members of a trawler in a Polish fishing fleet, had, while at sea, expressed opinions not in conformity with the official Communist Party line. The party political secretary on board their trawler was observed, between periods of acting as engineman, to be noting their conversations and, perhaps not unnaturally, the seven sailors entertained fears for their safety on returning to Poland. Their apprehensions were increased in that a brother of Kolczynski, one of the seven, had escaped from another trawler to England. In these circumstances, the seven sailors resolved to take over the trawler and steer to an English port, there to seek political asylum. Little opposition was offered to their seizure of control, the political secretary alone actively resisting and suffering a cut in the hand from Kolczynski's knife as a consequence: the captain was safely and easily secured in the water-closet whither he had repaired, perhaps with more prudence than dignity. Arriving at Whitby, the men sought political asylum and were detained under the Aliens Order, 1953.

Warrants were issued in Warsaw for the arrest of each of the seven men on charges including unlawful wounding, false imprisonment and revolt against the master on the high seas—all extradition offences. The chief magistrate at Bow Street, who heard the Polish Government's application for extradition, held that a prima facie case had been established against all of the prisoners as to the revolt on the high seas and against Kolczynski as to the unlawful wounding, but further held that the only object the prisoners had in mind was to leave Poland because of the oppression they suffered there. It was proved that England was an enemy country in the eyes of the Polish Government and that under Polish law treason was committed in leaving Poland and "going over to the enemy." The magistrate left the question of whether the offence was of a political character within section 3 (1) of the Extradition Act, 1870, to be decided by the High Court on the prisoners' applications for writs of habeas corpus.

The Divisional Court (Lord Goddard C.J., Cassels and Devlin JJ.) was therefore required to consider (1) the proper construction of section 3 (1); and (2) whether magistrates should themselves determine that an offence is or is not within section 3 (1) of the Act.

Section 3 (1) reads: "A fugitive criminal shall not be surrendered if the offence . . . is one of a political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character."

Upon the face of it, the subsection contains two limbs, intended to deal with different sets of circumstances. The first limb prevents the surrender of a fugitive if the evidence shows the crime to have been committed in circumstances clothing it with a political character; the second prevents his surrender, although the offence is not of a political character, if the fugitive can establish to the court that the requisitioning State really (" in fact ") requires his surrender so that it may try him for another offence which is of a political character, or at least punish him on his conviction of the non-political offence as though he had been tried for the political offence.

Cassels J. obviously adopted this construction holding that the offences here were of a political character within the first limb of the subsection: further that even if the seven men were tried in Poland for the extradition offences alone, they would be punished for an offence of a political character, *i.e.*, treason in " going over to the enemy," thus bringing the case within the second limb of section 3 (1).

Lord Goddard C.J. construed the subsection in an entirely different manner holding, in effect, that the two limbs merely reflected the ways in which the evidence might show the offence to be of a political character. " If in proving the facts necessary to obtain extradition the evidence adduced in support [of the requisition] shows that the offence has a political character, the application must be refused " (the first limb), " but although the evidence in support appears to disclose merely one of the scheduled [extradition] offences, the prisoner may show that in fact the offence is of a political character " (the second limb). " In other words, the political character of the offence may emerge either from the evidence in support of the requisition or from the evidence adduced in answer." The Lord Chief Justice accordingly held that, inasmuch as the evidence tendered in support of the requisition merely showed a revolt on the high seas, a scheduled offence, and the political character of that offence emerged only from the prisoners' evidence, the case fell within the second limb of the subsection as he construed it. In support of his construction Lord Goddard relied upon the provisions of section 3 (2) which, in effect, prohibit the surrender of a fugitive criminal unless there is provision either in the law of the requisitioning State or in a treaty concluded with it, that the accused person shall not be detained or punished by the requisitioning State for any offence committed prior to his

surrender other than the extradition crime. Such a treaty was made with Poland in 1932. Relying upon *Re Arton* (*No.* 1) [1896] 1 Q.B. 108, the Lord Chief Justice declared that "the court must not assume that the foreign State will not observe the terms of the treaty" and that therefore "the second limb of the section cannot mean that the court can say that if extradition is sought for crime A we believe that if surrendered he will be tried or punished for crime B."

With respect, it is submitted that the provisions of section 3 (2) in no way compel the strained interpretation of section 3 (1) which would deprive a fugitive criminal of an important additional protection against political persecution. In subsection (2) the legislature obviously intended that some safeguard should operate against abuse of surrender—the solemn investigation in this country into the nature of the offence would be rendered farcical if no steps were taken to require the foreign State to refrain from dealing with the fugitive on whatever grounds it thought fit. But it is not inconsistent with this proposition that the fugitive should none the less be at liberty to satisfy the authorities in this country that "in fact" (*i.e.*, despite the treaty) he will, if surrendered, be tried or punished for an offence of a political character. Although the courts will not assume that the foreign State will not observe the treaty (as the Lord Chief Justice said), *Re Arton* does not, it is submitted, preclude the reception of evidence and a finding by the court to that effect (as the argument of the Lord Chief Justice inferred and required). It is true that in *Re Arton* Lord Russell C.J. stopped counsel from arguing that the French Government ("a friendly State") was not acting in good faith in making its application, holding that the courts had no power to entertain that question, but it is apparent that both he and Wills J. in argument and in their judgments were considering not the second limb of section 3 (1) (the fourth ground relied upon by the prisoner) but the specific charge of lack of good faith in making the application (the prisoner's third ground). Indeed Lord Russell put the matter plainly in the argument regarding the second limb of section 3 (1) when he declared: "the statute clearly contemplates that a political offence has been already committed and that under cover of trying the accused for a crime the foreign tribunal will punish him for that past political offence." His construction of the subsection is clearly reiterated in his judgment dealing with this (the fourth) ground of the prisoner's case: "Can it be said that the application for extradition has been made with a view to try or punish the prisoner for an offence of a political character? It is clear what this suggestion means: it means that a person having committed an offence of a political character, another and wholly different charge (which does come both within the Extradition Act and the treaty) is resorted to as a pretence and excuse for

demanding his extradition in order that he may be tried and punished for the offence of a political character which he has already committed." Since no past political offence was disclosed on the evidence or could be named in argument, it was held in that case that the second limb of section 3 (1) could not apply. It would seem, therefore, that in purporting to follow *Re Arton*, Lord Goddard C.J. reached a conclusion diametrically opposed to the construction of section 3 (1) adopted in that case. Further, there would appear to be no necessity for reading the subsection as declaratory of methods of proving that an offence has a political character, since section 9 of the Act deals explicitly with the question, requiring the magistrate to hear the case in the same manner as if the prisoner were brought before him charged with an indictable offence committed in England. This must include, *inter alia*, reception of evidence from both sides, if tendered. The matter is put beyond doubt by the second paragraph of section 9 whereby the magistrate is required to receive "*any* evidence" which may be tendered to show that the crime is an offence of a political character (*i.e.*, the first limb of section 3 (1)) or is not an extradition crime.

In view of the importance of the matter, a separate judgment from Devlin J. would have been valuable: as it is, the learned judge may be taken to have supported either construction or both when he said "I agree."

In deciding the meaning of the phrase "an offence of a political character," both the Lord Chief Justice and Cassels J. considered the definition propounded in *Re Castioni* [1891] 1 Q.B. 149. In that case, John Stuart Mill's suggested definition, "Any offence committed in the course of or furthering of civil war, insurrection or political commotion," was rejected as too wide (surely not "too narrow" as Cassels J. stated [1]), Hawkins and Stephen JJ. preferring the latter's suggestion in his *History of the Criminal Law*: "Crimes [which] were incidental to and formed a part of political disturbances." Denman J. declared that "it must at least be shewn that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political rising, or a dispute between two parties in the State as to which is to have the government in its

[1] The definition of John Stuart Mill would give a political character to any offence committed (a) in the course of civil war, etc.; *or* (b) in the furtherance of civil war. The former is literally wide enough to cover anything done during the civil war, whether for political reasons or otherwise, and is obviously, therefore, too wide. Had the definition been "Any offence committed in the course *and* furthering of civil war, etc.," the conjunctive would qualify (a) above and narrow it to offences committed not only during the civil war but also as part of it. The definition of Stephen J. obviously accepts this narrower concept, requiring that the offences should be "incidental to *and* part of political disturbances." See *Castioni's* case, *per* Denman J., at pp. 155–6; *per* Stephen J., at p. 167: "It is very easy to give it too wide an interpretation," in rejecting John Stuart Mill's definition.

hands." Both Lord Goddard and Cassels J. apparently found the definition suggested by Stephen J. to be too narrow for the facts before them, Cassels J. stressing that "the words 'offence of a political character' must always be considered according to the circumstances existing at the time when they have to be considered" and distinguishing the state of world affairs when the *Castioni* case was decided. The Lord Chief Justice did likewise, holding that it was necessary to give "a wider and more generous meaning" to the words than was given in *Castioni's* case, "if only for reasons of humanity." Nevertheless, in neither judgment is any substituted definition to be found. Indeed, it is submitted that the definition of Stephen J. was perfectly adequate for the case of the seven sailors, provided the phrase "political disturbances" was given a common-sense interpretation in the light of existing political circumstances and not limited to forcible attempts to overthrow a government by an opposing party. In an age when one party only is permitted in a State, perhaps the only remaining method of active political protest may lie in withdrawing from that State and living elsewhere. It is true that in *Re Meunier* [1894] 2 Q.B. 415, Cave J. (Collins J. concurring) held that "to constitute an offence of a political character there must be two or more parties in the State, each seeking to impose the government of their own choice on the other, and . . . if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not." However, it is submitted that here again the non-totalitarian climate in which that case was decided must distinguish it: it is likely that at a time when "political disturbances" are of a party-against-party nature, any definition propounded will bear reference to the current form of political activity, particularly when it is sought to include within the court's protection the indiscriminate conduct of an anarchist (*Meunier's* case). Neither Lord Goddard nor Cassels J. made reference to *Meunier's* case in their judgments although, apparently, it was cited in argument before them.

The third matter of importance which required the court's consideration concerned the duties of a magistrate before whom fugitive offenders are brought. In *Castioni's* case, Hawkins J. had expressed the opinion that the magistrate had no right and was not required by the Act to make any decision as to the political character of the offence—merely to receive the evidence and, if the offence charged was made out, commit, leaving it to the Divisional Court on application for habeas corpus to decide if section 3 applied. This opinion, inconsistent with several subsequent decisions, was not followed by the court, both Lord Goddard and Cassels J. holding that it was the duty of the magistrate to decide whether or not the offence was within section 3 (1), for if it was, there would be no jurisdiction to commit.

The refusal of the Polish application for extradition in this case

is manifestly praiseworthy, "if only for reasons of humanity"; however, it is, perhaps, regrettable that the law on the interpretation of section 3 (1) should have been left in a state not only uncertain but also capable of dangerous restriction in the protection afforded by the Act to political fugitives.

William E. Denny.

An Important Aspect of Absolute Vicarious Criminal Liability

In *James & Son, Ltd.* v. *Smee* [1] and *Green* v. *Burnett & Chippeck Bedding Co., Ltd.*[1] the Divisional Court has recently clarified the criminal responsibility of hundreds of employers regarding the thousands of motor-vehicles they use on the roads of this country every day. These decisions are not only of far-reaching importance as regards vicarious criminal liability generally, but they also clearly demonstrate the numerous obligations of an absolute statutory nature which are imposed upon drivers and employers alike.

By section 3 (3) of the Road Traffic Act, 1930, it is an offence if any person [2] "uses" or "causes or permits" to be used on any road a motor-vehicle or trailer without complying with the regulations as to construction, weight and equipment.[3]

By regulation 101 of the Motor Vehicles (Construction and Use) Regulations, 1951:—

> "If any person [2] uses or causes or permits to be used on any road a motor vehicle or trailer in contravention of or fails to comply with any of the preceding regulations contained in Part III [4] of these regulations, he shall for each offence be liable to a fine not exceeding twenty pounds (£20)."

Part III of the above regulations contains extensive provisions governing the use of motor-vehicles and their trailers.

The comprehensive nature of the above requirements can be readily appreciated from a perusal of the regulations themselves; what we are here concerned with is the general effect of their non-observance, by any cause whatsoever, and the extent to which they give rise to an absolute vicarious criminal liability.

In both *James & Son, Ltd.* v. *Smee* and *Green* v. *Burnett &*

[1] [1954] 3 W.L.R. 631; [1954] 3 All E.R. 273.

[2] Relating to an offence punishable on indictment or on summary conviction, the expression "person" shall, unless the contrary intention appears, include a body corporate: Interpretation Act, 1889, s. 2 (1).

[3] See the Motor Vehicles (Construction and Use) Regulations, 1951 (No. 2101), Part II, regs. 5 to 58 inclusive, as subsequently amended by the Motor Vehicles (Construction and Use) (Amendment) Regulations, 1952 (No. 1453) and 1953 (No. 1872).

[4] Regs. 59 to 102 inclusive.

Chippeck Co., Ltd., there had been a breach of the braking requirements of regulation 75 which provides, *inter alia*, that "every part of every braking system and of the means of operation thereof fitted to a motor vehicle or trailer . . . shall at all times, while the motor vehicle or trailer is used on a road, be maintained in good and efficient working order and shall be properly adjusted."

In the first case, the breach was due to a trailer boy failing to reconnect the brake cable between a lorry and its trailer, after the trailer had been previously uncoupled for loading purposes at a brewery. The driver took no steps to check the connections but relied entirely upon his assistant, the trailer boy. On a charge against the company [5] for "permitting" the use of a trailer with a defective braking system contrary to regulations 75 and 101 of the Motor Vehicles (Construction and Use) Regulations, 1951, the Divisional Court [6] held:—

(1) That a company cannot be held guilty of "permitting" a user in contravention of regulation 101 unless some person for whose criminal act the company is responsible "permitted," as opposed to "committed," the offence.

(2) That the expression "permitting" at once imports a state of mind, and since there was no evidence that the company, by any responsible officer, permitted the user by the driver in contravention of the regulations, the appellants were not guilty of the offence charged.

It is important to note that the court were of the unanimous opinion that the company would have had no answer if they had been charged with "using" the trailer in contravention of the regulations.

Although a company charged with "permitting" cannot be properly convicted if no one has in fact *permitted* the use of the vehicle, a company charged with "using" may be convicted whenever a defective vehicle has been *used* by a company servant within the course of his duties. If one employee has *permitted* another employee to *use* the vehicle, then the company will be under a double vicarious liability provided, of course, both permission and user were within the scope of the respective employments. Moreover, where a company employee *causes* another to *permit* the *user* of a defective vehicle, a treble absolute vicarious criminal liability may well fall upon the company concerned. In order to avoid anomalous acquittals as in *James & Son, Ltd.* v. *Smee*, it is of the utmost importance that those entrusted with the drafting of information know which expression to select and do not charge a company with "causing" or "permitting" where the facts merely establish that a defective vehicle has been "used" by an

[5] The driver had previously been convicted of "using" the trailer contrary to the regulations.

[6] Lord Goddard C.J., Cassels, Lynskey and Parker JJ., Slade J. dissenting.

employee without any kind of mandate or permission from another member or servant of the company.

The most likely head of absolute vicarious criminal liability will no doubt arise in connection with the offence of " using " a vehicle in contravention of the regulations, as happened in *Green* v. *Burnett & Chippeck Bedding Co., Ltd.* In this case, informations were preferred against a driver and his employers, the respondent company, alleging that each of them unlawfully did use on a road a motor-van on which a certain part of the braking system fitted thereto was not maintained in good and efficient working order and properly adjusted contrary to regulations 75 and 101 of the Motor Vehicles (Construction and Use) Regulations, 1951. During the course of his employment, the driver had collided with a stationary motor-lorry as a result of a defect in the braking system due to a broken shim washer in the master cylinder which could have been discovered only by dismantling the cylinder. The vehicle had been handed over to a firm of automobile engineers on several occasions for maintenance, examination and repair, the last occasion being two days before the accident. There were indications, however, that the washer had been broken for some time and on the day before the accident the driver had had to " pump " the brake pedal on one occasion in order to obtain the necessary braking effect.

Because the defect arose from circumstances over which the defendants had no control, the magistrates dismissed the informations. On appeal by the prosecutor, the Divisional Court unanimously held that—

(1) the regulations laid down an *absolute* prohibition against user in contravention of their requirements;

(2) both the driver and the company had accordingly committed offences which were clearly proved; and

(3) the case must go back to the magistrates with a direction to convict.

The various principles and circumstances which govern the position in regard to absolute vicarious criminal liability under the all-important Motor Vehicles (Construction and Use) Regulations, 1951, may be stated as follows—

(1) Where a servant, acting within the general scope of his employment, does an act which the law absolutely prohibits, the master (whether an individual or a company) is criminally responsible for that act even though he has expressly forbidden it.

(2) While the driver of a vehicle on a road uses that vehicle in contravention of the Construction and Use Regulations, so also if he be a servant, does his master (whether an individual or a company), provided always that the servant is driving on his master's business. In other words, a master is " using " his vehicle if it is being used by his servant on his business, there being no difference whether the master is a private individual or a limited company.

(3) Applying the well-known test laid down by Atkin J. in *Mousell Brothers, Ltd.* v. *London and North Western Ry.*,[7] the prohibition against user in contravention of the regulations is an absolute prohibition in the sense that no *mens rea* apart from user need be shown to constitute the offence.

(4) Liability for contravention of an absolute prohibition depends upon the fact of contravention and not upon the intention to contravene. Neither *mens rea* in its true sense of importing a blameworthy mind nor so-called *mens rea*, *i.e.*, negligence in the failure to take reasonable steps to prevent the offence, is a relevant matter for consideration, except upon the question of punishment.

(5) In the case of a charge of " permitting " the use of a motor-vehicle in contravention of the regulations, the defendant must be shown to have actually " permitted," as opposed to merely " committed," the offence. Such permission at once imports a state of mind and a mere permission to use is not of itself sufficient; there must be permission to use *in contravention* of the regulations.

(6) " Permitting " has the same meaning whether the person charged is a private individual or a limited company, and accordingly, before a company can " permit " a user in contravention of the regulations, some person for whose criminal act the company is responsible must have permitted, and not merely committed, the user.

(7) Companies, public authorities, business organisations and all other employers, therefore, will *always* be under an absolute vicarious criminal liability whenever a motor-vehicle is " used " by any of its employees in contravention of the Motor Vehicles (Construction and Use) Regulations, 1951, provided, of course, the use of the vehicle is within the general scope of the driver's duties. In the case, however, of charges of " causing " or " permitting " a user in contravention of the regulations, absolute vicarious criminal liability will essentially depend upon whether or not an individual person for whose acts the appropriate employer is responsible has either " caused " or " permitted " the user in question.

M. R. R. Davies.

" Conducted for Purposes Connected with Lotteries "— A Problem of Statutory Interpretation

The case of *Maynard* v. *Williams* [1955] 1 W.L.R. 54; [1955] 1 All E.R. 81, provides an interesting example of three different judicial approaches to the construction of a statutory provision by a Divisional Court. It also illustrates once more that statute law can be just as uncertain in interpretation as case law. The section

[7] [1917] 2 K.B. 836 at p. 845.

under consideration was section 24 (1) of the Betting and Lotteries Act, 1934.

The Torquay United Supporters' Club obtained funds by a variety of methods, and used the money to assist the Torquay United Football Club. After spasmodic lotteries in 1953 the club organised a regular weekly lottery in March, 1954, which ran for eleven weeks until proceedings were instituted against members of the club. The magistrates convicted but the Appeal Committee of Quarter Sessions allowed appeals on the ground that the running of the lottery was only incidental and ancillary to the other methods and enterprises used by the club to raise its funds. By a majority the Divisional Court, Lord Goddard and Cassels J., Devlin J. *dissentiente*, restored the convictions. It will be submitted with respect that both Lord Goddard and Devlin J. adopted different and incorrect approaches as well as differing in opinion, and that the correct approach was that of Cassels J.

The respondents contended that the lottery was a private lottery within the meaning of section 24 (1) which reads where material as follows:— " . . . ' private lottery ' means a lottery in Great Britain which is promoted for, and in which the sale of tickets or chances is confined to . . . (*a*) members of one society established and conducted for purposes not connected with . . . lotteries. . . ." The appellant conceded that the club was *established* for purposes not connected with lotteries and the question therefore was whether it was so *conducted*.

Lord Goddard's view was that the object of the club was to raise money; some, in fact the greater part, was raised by means of a lottery, and hence the club was conducted for a purpose connected with lotteries. He did not consider that the finding of the Appeal Committee that the running of the lottery was only incidental and ancillary took the case outside the subsection, the mere fact that money was being raised by lotteries being sufficient to deprive the club of protection.

Cassels J. considered that in order to ascertain a connection with lotteries it was necessary to consider the frequency or scale of the lotteries, here considerable. He also seems to have held that running the lottery was the *main purpose* of the club, a quite different thing. But it is his approach to the question of connection that is of importance, since he clearly regarded it as a matter of degree.

Devlin J. thought that the proper concern of the court should be with the objects of the society, the test he would apply being to see whether or not the holding of lotteries had become a purpose of the society. It was necessary to distinguish between ends and means, and the fact that holding lotteries was a means to the club's avowed purpose of raising funds was not sufficient to take the club outside the subsection. His Lordship pointed out a difficulty inherent in the argument of the appellant and applied by

Lord Goddard, in that logically the holding of a single lottery for the club's purpose of raising funds would make it a purpose connected with lotteries. Even the prosecution shrank from this conclusion, but Devlin J. found it inescapable unless his test, which made it necessary for a finding that it was one of the purposes of the club to hold lotteries before it lost protection, was applied.

It is submitted that such a strict literal interpretation would lead to this difficulty. It would be insuperable because if a single lottery sufficed to deprive a society of protection it seems that the subsection never could apply as to part (*a*); but the subsection clearly requires for its operation not only that no *purpose* of a society should be to hold lotteries, but also that no innocent purpose should even be *connected* with lotteries. It is submitted with the greatest of respect that the test of Devlin J. ignores the fact that the words of the subsection say that a mere connection with lotteries will suffice for a society to lose its protection.

It is further submitted that the approach of Cassels J., namely that the frequency and scope of the lotteries must be considered, provides a way out of all difficulties. On this approach it is necessary neither to be involved in the logical difficulty of the strictly literal approach nor to ignore the force of the word "connected" as did Devlin J.

In truth the question of the connection of a purpose with the means used to effect it is surely as much a question of degree as is the question of when the means employed themselves become purposes. A few illustrations may help to make this point. Suppose it is my intention or purpose to save £100 and I do so by any of the three following methods or means:—(a) raising £90 by a single bet and £10 in savings of £1 a week, (b) raising £1 by a single bet and £99 in savings of £1 a week, and (c) raising £90 by nine bets and £10 by saving £1 a week. If, in relation to each the question is put whether or not my purpose of raising £100 is connected with betting, surely the answers given by a reasonable man would be Yes to (a) and (c) but No to (b). These would be the answers implicit in the approach of Cassels J. in the present case, but apparently Lord Goddard would answer all three affirmatively as would Devlin J., but the latter learned judge would also consider that this was not the question to pose for the wording of section 24 (1) (*a*).

Is this case not also an illustration that the problems of construction before the courts so very often raise what are really differences of degree, upon which opinions may differ quite properly? But is it not also more reasonable to approach such a problem *as* a matter of degree wherever possible rather than view it too logically and rigidly?

By way of postscript it may be mentioned that in the previous case of *Pearse and Others* v. *Hart* [1955] 1 W.L.R. 67; [1955] 1 All E.R. 91, reported as a note to *Maynard* v. *Williams*, the same

Divisional Court was unanimous in holding that on the facts of that case one of the purposes of the Gloucester City Association Football Club Supporters' Club was to hold lotteries, and hence no difficulty was found in that case.

R. A. Basker.

A New Test of Criminal Responsibility in Cases of Insanity

The Royal Commission on Capital Punishment [1] with the dissentient voice of Mr. Norman Fox Andrews Q.C. was unanimous in criticising the McNaghten rules. Unanimity ceased when it came to the question of recommending an alternative. A distinguished minority, including Leon Radzinowicz and Dame Florence Hancock, was in favour of the following formula: "The jury must be satisfied that at the time of committing the act, the accused as a result of disease of the mind (or mental deficiency) (a) did not know the nature and quality of the act or (b) did not know that it was wrong or (c) was incapable of preventing himself from committing it." The majority was bolder and recommended the complete abrogation of the rules: "In our view the test of criminal responsibility contained in the McNaghten rules cannot be defended in the light of modern medical knowledge and modern penal views. It is well established that there are offenders who know what they are doing and know that it is wrong (whether wrong is taken to mean legally or morally wrong), but are nevertheless so gravely affected by mental disease that they ought not to be held responsible for their actions." They agreed with Lord Cooper when he said, "However much you charge a jury as to the McNaghten rules or any other test, the question they will put to themselves when they retire is 'Is this man mad or is he not?'" and recommended that it be left to the jury "to determine whether at the time of the act the accused was suffering from disease of the mind or mental deficiency to such a degree that he ought not to be held responsible." This last test has now been adopted in the United States in the case of *Durham* v. *United States* (1954) U.S.App.D.C. 11859.

This is not the first time that the courts of the District of Columbia have put into operation a British recommendation ignored in this country. In 1922 the Atkin Committee recommended that a man should not be held responsible for his act "when the act is committed under an impulse which the prisoner was by mental disease in substance deprived of any power to resist." In 1929 in *Smith* v. *United States* (59 App.D.C. 144; 36 F. 2d. 548) the judge declared that it was "the law of this District that in cases where insanity is interposed as a defense, and the facts are sufficient to call for the application of the rule of

[1] Report, 1953, Cmd. 8932.

irresistible impulse, the jury should be so charged." "This means before it will justify a verdict of acquittal that his reasoning powers were so far dethroned by his diseased mental condition as to deprive him of the will power to resist the insane impulse to perpetrate the deed, though knowing it to be wrong."

Before laying down his new test in last year's case Judge Bazelon stated: "The science of psychiatry now recognises that a man is an integrated personality and that reason, which is only one element in that personality, is not the sole determinant of his conduct. The right-wrong test which considers knowledge or reason alone is therefore an inadequate guide to mental responsibility for criminal behaviour. The fundamental objection to the right-wrong test, however, is not that criminal irresponsibility is made to rest upon an inadequate, invalid or indeterminable symptom or manifestation but that it is made to rest upon *any* particular symptom. In attempting to define insanity in terms of a symptom the courts have assumed an impossible role, not merely one for which they have no special competence." The judge then goes on to refer and quote from the Gowers Report and abandons the "irresistible impulse" test in these words: "We find that the 'irresistible impulse' test is also inadequate in that it gives no recognition to mental illness characterised by brooding and reflection and so relegates acts caused by such illness to the application of the inadequate right-wrong test."

"The rule we now hold must be applied on the retrial of this case and in the future cases it is not unlike that followed by the New Hampshire Court since 1870. (*State* v. *Pike* 49 N.H. 1; Shirley 399.) It is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect. We do not and indeed could not formulate an instruction which would be either appropriate or binding in all cases. But under the rule now announced any instruction should in some way convey to the jury the sense and substance of the following: If you, the jury, believe beyond a reasonable doubt that the accused was not suffering from a diseased or defective mental condition at the time he committed the criminal act charged, you may find him guilty. If you believe he was suffering from a diseased or defective mental condition when he committed the act, but believe beyond a reasonable doubt that the act was not the product of such mental abnormality, you may find him guilty. Unless you believe beyond a reasonable doubt that he was not suffering from a diseased or defective mental condition, or that the act was not the product of such abnormality, you must find the accused not guilty by reason of insanity. Thus your task would not be completed upon finding if you did find that the accused suffered from mental disease or defect. He would still be responsible for his unlawful act if there was no causal connection between such mental abnormality and the act." "The legal and moral traditions of the western world"

he concluded "require that those who of their own free will and with evil intent (sometimes called *mens rea*) commit acts which violate the law, shall be criminally responsible for those acts. Our traditions also require that where such acts stem from and are the product of a mental disease or defect as those terms are used herein, moral blame shall not attach, and hence there will not be criminal responsibility. The rule we state in this opinion is designed to meet those requirements."

The judge's wording of his test illustrates another difference between American and English practice. In English law the accused must rebut a presumption of sanity, although the burden of proof to be applied is that appropriate to civil not criminal proceedings, namely a balance of probabilities.[2] In *Tatum* v. *United States* (88 U.S.App.D.C. at 389; 190 F. 2d. at 615), another District of Columbia case, the court stated "as soon as some evidence of mental disorder is introduced, sanity like any other fact must be proved as part of the prosecution's case beyond a reasonable doubt." This rule is better in principle than the English rule. Insanity relates to *mens rea*. It is surely unjust that an insane person, suffering from a disability through no fault of his own, should have in effect to disprove *mens rea*. The confusion in English law arises from the failure to distinguish between the burden of introducing evidence and the burden of proof of an issue in the case itself.

It is sad to reflect that while the American courts are availing themselves of the wisdom of the Gowers report, no effort is being made in England, which of course must be by statute, to put its recommendations into practice.

Norman St. John-Stevas.

Occupiers and Children of Tender Years —Another Approach

Whether the duty of occupiers towards children of tender years who enter upon their land or premises ought to be limited by regarding such children as enjoying a licence conditional upon their being accompanied by some competent guardian, or whether the liability of occupiers towards such children can be determined in some other way—this was the question which Devlin J. considered at length in his important reserved judgment in *Phipps* v. *Rochester Corporation* [1955] 2 W.L.R. 23; [1955] 1 All E.R. 129.

Some six months prior to this action, the Court of Appeal had before them the very same question, in *Bates* v. *Stone Parish Council* [1954] 1 W.L.R. 1249 (see note in this journal : 18 M.L.R. 59), and decided it on the footing that in such cases the licence to

[2] *Sodeman* v. *R.* [1936] 2 All E.R. 1138 at p. 1140. *R.* v. *Carr-Briant* [1943] K.B. 607 at p. 610; [1943] 2 All E.R. 156.

enter which was conferred upon the child was conditional upon its being accompanied by a suitable guardian. This case does not appear to have been cited to Devlin J., which is surprising, but that oversight may nevertheless turn out to have been a very fortunate one for the development of the law, for it meant that the learned judge applied his mind to the question uninfluenced by the opinions of the learned Lord Justices of the Court of Appeal.

After an exhaustive analysis of the different ways in which the courts have approached the problem, Devlin J. discusses the merits of the conditional licence approach, and comes to the conclusion that it is to be condemned as artificial. He observes that the notion has not been followed in any case in the Court of Appeal in the last thirty years where one might have expected it to be considered, with the exception of the reference made to it by du Parcq L.J. in *Morley* v. *Staffordshire County Council* [1939] 4 All E.R. 92, 96. He also notes that Hamilton L.J., who accepted the idea in *Latham* v. *Johnson* [1913] 1 K.B. 398, 414, was not so sure about it when, as Lord Sumner, he took part in the decision of *Glasgow Corporation* v. *Taylor* [1922] 1 A.C. 44, at 66–7. The learned judge refers to the following unresolved questions which appear to be involved in the conditional licence approach:

(1) how young must a child be to be " of tender years " ?
(2) how old must a person be to constitute a suitable guardian ?
(3) what if a suitable guardian is provided, but he or she is temporarily distracted at the critical moment and does not notice the danger to the child ?

He also points out that the essential difference between the conditional licence approach and that which he suggests lies in the effect on the rights of a child injured by something on the land which by any standard would amount to a trap. On the conditional licence theory an unaccompanied child must be regarded as a trespasser and there will be no redress, whereas if the child is regarded as a licensee, the duties of the licensor towards him in such circumstances will not be qualified because the child is unaccompanied, for the presence of a guardian would have made no difference.

The question which remains is what is the alternative. It is, in Devlin J.'s view, to make the general rules governing the relationship of licensors and licensees work in the case of little children by regarding the licensor's duty as not being unlimited but as bearing some relation to the " habits, capacities and propensities " of those whom he himself has licensed. In the case of little children, a licensor is entitled to assume, in the absence of evidence to the contrary, that they will not be allowed by their parents to go out unaccompanied and play on land or premises which the parents know may be dangerous. Support for this view

is derived from Lord Shaw's speech in *Glasgow Corporation* v. *Taylor* [1922] 1 A.C. 44, 61, where he says that the municipality is entitled to take into account that reasonable parents will not permit their children to be sent into danger without protection. It may well be that different considerations will apply to public recreation grounds and parks to which parents allow their children to go unaccompanied in the belief that they are safe, and Devlin J. is careful to qualify his remarks in this respect.

The judgment contains a strong statement concerning the duties of parents towards their children. It may well be difficult for parents who are, for example, both out working, to ensure the high standard of supervision of their children which the learned judge seems to require of them, and the judgment does not leave much room for qualifying the duty, although it does concede that the licensor must "take into account the social habits of the neighbourhood." What is here laid down seems to throw doubt on the accuracy of the passage in Winfield which states that "the law tacitly takes account of the fact that among the poorer classes even very young children are usually under the charge of nobody of responsible years when they go abroad, and that this, taken by itself, will not deprive them of a remedy." (Winfield on *Tort*, 6th ed. (1954), p. 716.)

If it is thought desirable to reject the notion of conditional licence and accept Devlin's alternative, no fears need be entertained that an ancient and authoritative rule of law is being overthrown. The origin of the notion, as was pointed out in my previous note (18 M.L.R. 59), appears to be in the judgment of Lindley J. in *Burchell* v. *Hickisson* (1880) L.J.C.P. 101 at 102, and what was said in this respect must be regarded as obiter. But the Court of Appeal decision in *Bates* v. *Stone Parish Council* now stands in the way of any other solution, and the pity is that the order of events cannot be reversed so as to make available to the Court of Appeal the possibility of considering the adoption of Devlin J.'s alternative proposal.

J. E. Hall Williams.

Duties of Occupiers of Land

Most law reformers have passed sentence of death by parliamentary execution on the common law distinctions between the duties owed by the occupiers of land to invitees, licensees and trespassers. The judges, however, have largely anticipated the parliamentary act. So far as "active negligence" is concerned two recent cases have shown that the distinction between duties to invitees and licensees is being eliminated, and in another case the Court of Appeal has indicated a doubt whether trespassers are to be regarded as forming a separate category. In this last respect the courts

have gone beyond the over-cautious recommendations of the Third Report of the Law Reform Committee.

In *Slade* v. *Battersea Hospital Committee* [1955] 1 W.L.R. 207; [1955] 1 All E.R. 570, Finnemore J. has shown again how unnecessary it is to invoke the traditional distinction between invitees and licensees. The plaintiff was given permission to visit at any time her husband who was on the danger list of the defendants' hospital. One morning while leaving the ward she sustained damage as the result of falling on a part of the floor where the polish had been applied but not yet polished off, so that the part was "slippery and dangerous." Counsel's arguments in the resultant litigation are, unfortunately, not reported, but the first part of the judgment of Finnemore J. is directed to the questions of whether the plaintiff was an invitee or licensee, and whether there was a breach of the respective duties owed to such persons. Finnemore J. held that the plaintiff was an invitee, putting an interesting gloss on the existing criterion of a "common material interest." He refused to confine such interests to those of a pecuniary character. There was no money payment involved but "a visit by a wife at the invitation of a hospital to her dangerously ill husband in the hospital is a matter of material interest both to her and to the hospital." He thought that "having in mind *Pearson* v. *Lambeth Borough Council*, . . . within certain reasonable limits we tend rather to widen the definition or description of 'invitee.'" This sentence, though calling for semantic analysis, is on the whole a blow against the nominalists who, refusing even to mention "real definition," consider that nothing hangs on the meaning of a name. It was apparently conceded that the defendants were liable if the plaintiff were an invitee, but Finnemore J. also held that they were liable if the plaintiff were a licensee, for he held that the situation constituted a "trap." "This danger was a concealed danger. . . . A person looks in front of him for any obvious obstruction: it does not seem to me one is called on to make a particular search of the floor as one goes along."

The new approach is found in the concluding part of his judgment. He asked: "After all, does it matter what the plaintiff was?" He proceeded to apply the dictum of Denning L.J. in *Dunster* v. *Abbott* [1954] 1 W.L.R. 58; [1953] 2 All E.R. 1572. In his judgment in that case the Lord Justice had said that in regard to current operations it did not matter whether the plaintiff was an invitee or a licensee. The polishing of the ward floor was a "current operation"; due care was owed to those in proximity to it, and the failure to give warning was, therefore, negligence. It is noteworthy that Finnemore J. did not consider whether the dictum on which he relied formed part of the *ratio decidendi* of the judgment of Denning L.J.

In a note to *Dunster* v. *Abbott* (*supra*, Vol. 17, p. 265), I suggested that the courts could now adopt the principle put forward

by Marsh (69 L.Q.R. p. 360) that cases of " active " negligence by a landowner should be decided without regard to *any* part of the traditional classification of invitee, licensee and trespasser. His principle becomes identical with the principle of the dictum of Denning L.J., if that dictum be extended to cover trespassers. After all, to adopt the language of Finnemore J. would it have mattered in *Slade's* case whether the plaintiff was a trespasser? Suppose, instead of being given permission by an authorised official of the hospital, the wife of a hospital patient is told by some unauthorised stranger that it is all right for her to go into a ward, and while there a nurse carelessly upsets some boiling water on her. Is it really a defence that she is a trespasser? Perhaps the courts would " widen the definition or description of " licensee. But that way leads to the fictions of primitive legal systems.

In *Randall* v. *Tarrant* [1955] 1 W.L.R. 255; [1955] 1 All E.R. 600, the Court of Appeal was presented with an opportunity for declaring that so far as " active negligence " is concerned it matters not that the plaintiff is a trespasser. The judges did not make such an express declaration, but they specifically refused to accept the proposition that a trespasser is in a different category from others, and that as far as " active negligence " is concerned he must show " something more than the absence of reasonable care." The plaintiff left his car as close to the near side as possible in a narrow country lane leading to the defendant's farm, which, nevertheless, constituted a highway. The defendant, driving a tractor towing a wide baler, endeavoured to pass. The maximum possible clearance was only nine inches, and there was a collision. To me the basis for decision seems clear. Did the defendant exercise reasonable care in the circumstances in the manner in which he drove the tractor? No other question was involved since this was a case of " active " negligence. A duty to take care arose from mere propinquity, and the sole question should have been whether there was negligence. But the defendant contended that this was not a correct approach since the plaintiff was a trespasser. The plaintiff and his son had left the car, and trespassed on the defendant's fields. The result was, contended counsel, relying on *Hickman* v. *Maisey* [1900] 1 Q.B. 752, that " there was no longer a legitimate use of the highway by the plaintiff, since he had put the car there so that he could go as a trespasser into the plaintiff's fields " ([1955] 1 All E.R. at p. 603H). The further consequence was that absence of reasonable care by the defendant was not sufficient to involve him in liability. The dictum of Lord Hailsham L.C. in *Addie & Sons* v. *Dumbreck* [1929] A.C. at p. 365 applied: before an occupier of land is liable to a trespasser there must be " something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser."

Owing to the regrettable practice of omitting the argument of counsel from reports, it is not known what reply counsel for the plaintiff made to this contention. It has been submitted in the note to *Dunster* v. *Abbott*, already referred to, that *Excelsior Wire Rope Co.* v. *Callan* [1930] A.C. 404, establishes that the dictum of Lord Hailsham applies only to liability for the static conditions of premises and not to liability for active negligence: the "trespasser" in the dictum refers to potential trespassers not specific persons whose actual presence is known. This submission is not referred to in the judgments in *Randall* v. *Tarrant*, which were content to rebut the defendant's contention by holding that the plaintiff was not a trespasser. Both Evershed M.R. and Jenkins L.J. refused to consider what the position would have been had the plaintiff been a trespasser. Jenkins L.J. said it was "unnecessary to express any view": Evershed M.R., who quoted the dictum of Lord Hailsham, said: "On some future occasion it may be necessary to consider the application of those principles." Morris L.J. devoted his entire judgment to the question of whether there had been negligence. It is, of course, consistent with his omission of any reference to the argument of counsel for defendant, to say that he considered as irrelevant the question of whether the plaintiff was a trespasser. But the argument from silence is never a convincing one, and we must await some further case before there is specific legal authority for the juristic doctrine of Marsh. Or will Parliament act first?

J. L. Montrose.

Aquilian Liability for Negligent Misrepresentation—Candler *v.* Crane, Christmas & Co. in Ceylon

Your readers may be interested to learn, as a footnote to the comments of Dr. Honoré on the South African case of *Herschel* v. *Mrupe* (1954) 3 S.A.L.R. 464 (*vide* 18 M.L.R. 62), that by a coincidence the question of Aquilian liability for negligent misrepresentation arose indirectly, at about the same time as the above case was being decided, before the Supreme Court of Ceylon, which is the only other country in the world whose common law is the Roman-Dutch law. It is possibly not a coincidence that the Ceylon Supreme Court also exhibited the same judicial caution as the South African Appellate Division.

In *Chissel* v. *Chapman* (1954) 56 Ceylon N.L.R. 121, the defendant-appellant, a general medical practitioner, was employed by Cable & Wireless Ltd. to examine and report on the physical condition of telegraphist-apprentices recruited by the company, which, to the defendant's knowledge, did not accept any apprentices for permanent employment unless such medical report was favourable. The plaintiff-respondent having been selected for service as an

apprentice was examined by the defendant who reported to the company that he was unable to recommend him for employment. The direct consequence of this report was that the plaintiff's engagement as an apprentice was abruptly but lawfully terminated by the company. The plaintiff-respondent thereupon instituted action against the defendant alleging that he was in fact perfectly fit for employment as a telegraphist and that the defendant's unfavourable report was unjustified and "due to gross negligence and/or incompetence." No allegation was made, nor was there any evidence, that the defendant had acted maliciously or dishonestly in the matter. The Supreme Court held, reversing the judgment of the trial judge,

(*a*) that the action was not maintainable even if the defendant's medical opinion concerning the plaintiff's suitability for employment had been negligently arrived at, and

(*b*) that in regard to the question of negligence, the law did not impose any duty of care on the defendant towards the plaintiff other than the obvious duty not to cause him physical injury in the course of the examination.

It will at once be apparent that the above facts do not constitute a textbook case of negligent misrepresentation in that the alleged negligent statement was here made not to the plaintiff but to a third party who acted on it to the detriment of the plaintiff. Though most of the South African and English cases on negligent statements were cited during the argument and are considered in the judgment of Gratiaen J., the court was not therefore called upon to hold definitely whether or not a defendant is or should be liable under the *Lex Aquilia* in the modern Roman-Dutch law for a false and negligent statement made directly to the plaintiff who has suffered loss by acting upon it. The court's decision on the particular facts before it seems unquestionably correct, for as Gratiaen J. said (at pp. 124, 125):

> "If and when a case arises in our courts where damages for pecuniary loss are claimed by a person who was actually deceived by another's negligent misrepresentation, it will be necessary to decide whether *Perlman's Case* (1934) C.P.D. 151 should be followed in Ceylon. I observe that it has been criticised on more than one occasion by judges and distinguished academic lawyers in S. Africa. In *Alliance Building Society* v. *Deretich* (1941) T.P.D. 263, for instance, Berry J. adopted the more conservative view expressed ten years later in England by the majority of the judges who decided *Candler's* case. In *Western Alarm System* v. *Coini* (1944) C.P.D. 271, Jones J. and de Villiers J. found it necessary to resolve the conflict of authority, but were content to rule that, in either view, a negligent false statement was actionable *if made directly to the plaintiff* (*i.e., the person actually deceived*) *to whom the speaker or writer was bound by contractual relationship, with knowledge or notice that it would be acted upon.* In a more recent judgment, Malan J. decided that, before liability can attach in an

action founded on a negligent misrepresentation which takes the form of deceit, ' *some special relationship* (between representor and representee) *must exist—contractual or fiduciary—or some special circumstances must exist which create a similar relationship* '—*Mrupe* v. *Herschel* (1953) 3 S.A.L.R. 553. This, in his opinion, is the only exception to the general rule that " independently of contract, a false representation causing damage is not actionable *unless fraudulent* "—*Dickson & Co.* v. *Levy*, 11 S.C. 36.

" The present state of these S. African authorities indicates that, even in an action under the Roman-Dutch law for damages instituted by someone who was actually misled by another's negligent misrepresentation, it is at least doubtful whether (and if so, to what extent) negligence by itself suffices to establish a cause of action. But there is certainly no precedent for applying the ruling in *Perlman's* case (*supra*) to the elements of an entirely different delict, conveniently described as ' injurious falsehood.' "

It is evident, however, from the learned judge's judgment, that though he was not called upon to decide the difficult question of negligent misrepresentation, he was alive to the implications of the problem. At p. 127 occurs the following passage:

" In England, ' less timorous ' common law judges sometimes find themselves free to invent a new cause of action to meet a new situation (if the problem is unembarrassed by binding precedent). But those of us who administer the Roman-Dutch law cannot disregard its basic principles although (on grounds of public policy or expediency) we may cautiously attempt to adapt them to fresh situations arising from the complex conditions of modern society. But we are powerless to alter the basic principles themselves, or introduce by ' judicial legislation ' fundamental changes in the established elements of an existing cause of action."

It is not clear from his judgment whether the learned judge considers it " a basic principle " of the Aquilian action in the modern Roman-Dutch law that it does not lie where the damage complained of was not physical in its incidence to either person or property, though he notes that the principle in *Donoghue* v. *Stevenson* does not. As far as the writer is aware, there is no South African or Ceylon authority which has so held. It is curious that the English law of negligence, which supposedly " just growed," has recognised at least indirectly that without this limitation the broad principle becomes unworkable, whereas the Roman-Dutch law, which started with an action which was in its origin so confined, finds itself unable to answer this fundamental question one way or the other.

K. Shinya.

Collection of Cheques for an Agent

New cases on the law of cheques are becoming rare, and those on bills of exchange other than cheques very rare. Commercial bills are much less used than formerly which is no doubt one reason for this, though one suspects that the successful codification of the law in the Bills of Exchange Act, 1882, has so clarified the law as to make recourse to litigation no longer necessary in many cases which would certainly in early years have come before the courts. But Part III of the Act which deals with cheques made a good deal of new law, or rather brought into the code a good deal of fairly new statute law which had received but little judicial consideration, so that the bulk of the case law relating to the Act has been concerned with cheques.

It is no doubt largely because the main problems raised by these sections have now been cleared up that new cases have become scarce, but another element in the situation has undoubtedly been the growing awareness on the part of the banks of their legal responsibilities in connection with handling cheques. This has led to the building up of a system of safeguards. These if effectively and intelligently operated by the officers in charge of the branch banks to a large extent obviate the possibility of things going wrong. Indeed the whole system which has been built up in response to a number of legal decisions which have gone against the banks furnishes an admirable illustration of the way judicial decisions can under the common law system influence business men so to conduct their operations as to protect the interests of the commercial world, and indeed of the public as a whole.

The most difficult of the problems which have come up have been those arising from the collection of crossed cheques for customers where, as is well known, section 82 of the statute abrogates the common law liability of the banker to the "true owner" of crossed cheques collected for a customer whose title is defective. This it does conditionally on the banker having satisfied various conditions set out in the section, the most important of which is that he should not have been negligent.

The great bulk of the heavy and expensive litigation to which the section has given rise has been concerned with the question of negligence but a point of importance which has remained a little obscure is that relating to who is to be regarded as a "true owner" for the purposes of the section. Both these matters came up for consideration by McNair J. in *Bute* (*Marquess*) v. *Barclays Bank, Ltd.* [1954] 3 W.L.R. 741; [1954] 3 All E.R. 365.

The facts were shortly as follows. The plaintiff employed as manager of certain of his farms a Mr. McGaw, whose duties included making application to the Department of Agriculture for certain subsidies to which the plaintiff was entitled. These he was instructed to pay over to the plaintiffs' factor (a Scottish term which appears

to be the equivalent of estate manager). McGaw applied for subsidies in respect of three farms in the name of the plaintiff but signing the official forms in which the applications were made in his own name. He received from the Department three warrants drawn for sums totalling £546 and these he had collected for him by the defendant bank. It was in respect of this collection that the plaintiff brought his action contending that it amounted to the conversion of his warrants. Alternatively he sued for money had and received.

The warrants in question were made payable to McGaw, his name and address in Bute appearing in what is called a box, a rectangular space placed for that purpose on the warrant. Just outside this box and opposite the name of McGaw appeared the words " (for Marquis of Bute)." By the time these warrants reached McGaw he had left the service of the plaintiff and had gone to live near Barnsley, Yorkshire, and it was at a branch of the defendant bank at this town that he got them collected, opening an account for the purpose with the warrants in question. He was asked for references which he gave and which on being taken up proved satisfactory, but until that had been done he was not given a cheque book, and was not allowed to operate his account.

The bank defended themselves on three grounds: (a) that the plaintiff was not the owner of the warrant at all, (b) estoppel and (c) section 82 as applied to warrants of this type by section 17 of the Revenue Act, 1883. Of these the one which they pressed hardest was the first. And it had a certain strength, for the warrant was in terms payable to McGaw who in the circumstances, it was submitted, must be taken to have been the true owner of the instruments, as being the party intended under its terms to receive the money.

The question of who is " the true owner " has been discussed in relation to section 82—in the textbooks rather than in the cases: as Paget points out " the term constantly occurs in judgments . . . but without definition " (*Law of Banking*, 5th ed., p. 230). Most of these cases have been concerned with the rights of persons from whom cheques have been stolen, collection having taken place after the forgery of indorsements, and could not throw any light on the problem under discussion here. There are a few cases, however, involving the fraudulent drawing of cheques by agents on their principals' accounts in their own favour, as *Midland Bank, Ltd.* v. *Reckitt* [1933] A.C. 1; *Morrison* v. *London County & Westminster Bank, Ltd.* [1914] 3 K.B. 356; and *Lloyds Bank, Ltd.* v. *Chartered Bank of India, Australia and China* [1929] 1 K.B. 40. In these cases it seems to have been assumed that the agents in question were not the true owners of the cheques—at any rate it was not apparently seriously contended that they were, for the arguments turned round the question of negligence which on any such basis would have been irrelevant. McNair J. naturally did not find them

helpful. In *Great Western Ry.* v. *London County Banking Co., Ltd.* [1901] A.C. 414, however, the facts were nearer to those of the instant case for the railway company had made cheques which they had drawn in payment of rates payable to the order of Huggins the rate collector by name. The cheques were obtained by Huggins from the plaintiff on the false pretence that money was due from them for rates and were afterwards collected for him by the defendants. The plaintiffs were accordingly the party who drew the cheques, not the overseers who employed Huggins. And McNair J. apparently for this reason did not find the case helpful either. However, the remarks of Lord Davey (at p. 419) do suggest that in the opinion of that learned judge the position would have been just the same if the pretended rate had in fact been made. He said "I am of opinion that Huggins never had any property in the cheque which was handed to him only as the collector or agent of the overseers in payment of a debt alleged to be due to them. The appellants never intended to vest any property in him for his own benefit, but the property in the cheque was intended to be passed to his employers, the overseers, notwithstanding that it was made payable to Huggins' order. Huggins therefore had no real title to the cheque." These words cover very precisely the circumstances under which the Department of Agriculture paid the warrants which were in question in this case to McGaw.

There is also *Slingsby* v. *District Bank, Ltd.* [1932] 1 K.B. 544, not so similar to the instant case on its facts, but rather like it in respect of the form of the instrument. There a cheque was drawn by executors on the defendant bank payable to the order of John Prust & Co. a firm of stockbrokers. In the gap between the payee's name and the space containing the amount to be paid, Cumberbirch, a fraudulent solicitor, inserted the name of his own firm Cumberbirch & Potts. He afterwards got the cheque collected through the Westminster Bank. An action against that bank failed (*Slingsby* v. *Westminster Bank, Ltd.* [1931] 2 K.B. 583), but in the successful action against the drawee bank the Court of Appeal overruled the decision in that case, holding in effect that by collecting the cheque for Cumberbirch & Potts instead of for the executors the Westminster Bank had been guilty of conversion; for the instrument did not "authorise such collection." In other words a cheque payable to A through B is to be collected for the account of A and not for that of B. Now there is no real difference between an instrument for payment to A through B and one for payment to B for the account of A—the intention as expressed in the document in both cases is that A shall get the money: that is A and not B is the owner of the instrument. And this was the view of the matter taken by McNair J.

The learned judge refused to disregard the words "(for the Marquis of Bute)" which in his view made it clear that the intention was that the plaintiff should receive the money, the name of

McGaw being inserted simply as that of the agent through whose instrumentality it was to reach the owner. The suggestion that the words in question were added merely for the purpose of informing McGaw as to the transactions in respect of which the money was being paid he found it quite impossible to entertain—it is indeed on the face of it somewhat far fetched.

The learned judge also took the view that even if the plaintiff was not the true owner of the instrument he was entitled to the immediate possession of it, since McGaw had left his service. This alone would have given him the right to sue the bank in conversion. Indeed this was the main ground of his decision.

The two other grounds of defence relied upon by the bank do not call for discussion. On the one the learned judge refused to find that the plaintiff through his factor had misled the bank into collecting the money for McGaw. On the other he held that the bank had not discharged the burden of showing that they had exercised due care under section 82.

The discussion on the property points has caused some perturbation in banking circles, partly because this is the first case in which a banker has been held liable for the conversion of an instrument collected for a payee where there was no fraud in the issue, and partly and, more important, because it appears to make a substantial inroad on the principle of negotiability. The great value of negotiability is that it avoids the technicalities of conversion which often work great hardships to third parties bona fide handling chattel property. Certainly as regards the possession point the bank could not without making a requisition of title reminiscent of that occurring on a conveyance of real property have discovered the plaintiff's immediate right to this. And it is hardly just to make the decision turn on the question whether the contract of service is subsisting. As to the true ownership point however the instrument bore on its face sufficient to inform a knowledgeable bank officer that the plaintiff and not McGaw was the true owner and the grievance both here and in the *Slingsby* case is that the bank is being made the victim in what should have been essentially a dispute between the plaintiff and the Department of Agriculture. Was it intended that McGaw should have the money or only that he should have the instrument to transmit to his master? The document was compatible with the former view and in the circumstances it is perhaps hard that a bank officer should have to decide, and to decide correctly, that the latter was the real intention. Nevertheless on balance the rules governing the handling of cheques and similar instruments have become so far independent of the general principles of negotiability—for after all it is in a sense an accident that a cheque is a negotiable instrument at all—that it is common form to insist on inquiry when the instrument is, on the face of it, somewhat unusual. In the circumstances it is

submitted that the decision is in line with the trend of the cases and does substantial justice between the parties.

CHORLEY.

F.A.S. Contract—Failure to Obtain Export Licence—Conflict of Laws

The problem which came before the Court of Appeal in *M. W. Hardy & Co. Inc.* v. *A. V. Pound & Co., Ltd.* [1955] 2 W.L.R. 589; [1955] 1 All E.R. 666, was, as admitted by two members of the court, by no means an easy one. By a contract made in London, the buyers (an American company) agreed to buy from the sellers (an English company) a quantity of Portuguese turpentine f.a.s buyers' tank steamer in Lisbon, payment to be by confirmed irrevocable credit in the sellers' name in Lisbon. The buyers required the goods for shipment to Rostock in Eastern Germany. The sellers then entered into a contract to purchase the goods from Portuguese suppliers. Under Portuguese law the export of turpentine was unlawful except under licence which had to be produced at the Custom House before the consignment could be cleared. The licence, apparently for political reasons, was refused. Although requested by the sellers, the buyers declined to give alternative shipping instructions. The parties submitted the dispute to arbitration and the arbitrators awarded that the buyers were in default in refusing to accept delivery, and assessed the damages at the sum of 300,000 escudos. The buyers appealed to the Board of Appeal of the London Oil and Tallow Trades Association. The board stated its award in the form of a special case for the decision of the court but held, subject to the opinion of the court, that the refusal by the Portuguese authorities of the licence operated to discharge the contract between the sellers and the buyers and accordingly reversed the award of the arbitrators. McNair J., however, restored the award, finding that the buyers were in default. The buyers appealed and the Court of Appeal allowed the appeal, holding that the contract was discharged.

What, first, was the proper law of the contract? McNair J. held it was English law, and his decision on this point received the approval of the Court of Appeal. Whilst this may be the right view, it is unfortunate that the judgments contain no discussion whatsoever of the possible claims of Portuguese law as both the *lex loci solutionis* and the *lex situs* of the goods. The matter-of-fact acceptance of the *lex loci contractus* as the proper law will disappoint those who were gratified when the same court in *The Assunzione* [1954] P. 150, refused to attach any undue importance to the place of contracting when it was not at the same time the place of performance. Having thus held that the contract was governed by English law, McNair J. proceeded to follow *H. O.*

Brandt & Co. v. *H. N. Morris & Co., Ltd.* [1917] 2 K.B. 784, where the Court of Appeal decided that the obligation of applying for a licence lay on the buyers and not on the sellers. The decision in *Brandt's* case seems at first sight to cover the present case, but, as stressed by all the members of the Court of Appeal, there are important differences. In *Brandt's* case the contract was made at a time when an export licence was not required. This point is of some significance. In *Re Anglo-Russian Merchant Traders, Ltd. and John Batt & Co. (London), Ltd.* [1917] 2 K.B. 679, where, as in the present case, an export licence was necessary at the date of the contract, the duty to apply for the licence was placed by the Court of Appeal upon the sellers.

Another difference is that in *Brandt's* case both contracting parties were in business in this country, and the buyers alone knew what was the destination of the goods. In the present case the buyers apparently did not even know at the time of the contract that a licence was needed. Commenting on this, Singleton L.J. observed ([1955] 2 W.L.R. at p. 597): "I would add that, though both parties must be assumed to know the law of this country, no such assumption arises in the case of the law of Portugal." This presumably means that when English law is the proper law of a contract and, as such, governs its construction, it will not conclusively imply acquaintance of the parties to that contract with foreign legal rules. Admittedly, the knowledge or lack of it of the Portuguese regulations on the part of the buyers was relevant in determining the duties of the parties to the contract. But the above statement must be so restricted. In *Norden Steamship Co.* v. *Dempsey* (1876) 1 C.P.D. 654, the court brushed aside the argument that as the contract (to carry timber from Riga to Liverpool) was governed by foreign law, the shipowners could not be bound by a local English custom pertaining to the mode of performance of which they could not be assumed to be cognisant. Lord Coleridge C.J. said (at p. 660): "The contract must be taken to have been made with reference to the usage of the port."

The most material element of difference is that in the present case both parties appear to have understood that the Portuguese suppliers, with whom the sellers alone were in touch, would apply for a licence. Again, the sellers for their part were certainly cognisant of the Portuguese requirements, which cast the duty of obtaining the necessary permit upon the suppliers, who had to be registered with the licensing authority. It would appear, therefore, that these special circumstances distinguished the present from *Brandt's* case sufficiently for the Court of Appeal to decide that the duty to obtain a licence in this particular contract rested with the sellers. *Brandt's* case must not be regarded as laying down any hard and fast rule. Accordingly, all that needs to be said is that in the present case there was sufficient ground, in the words of Romer L.J. ([1955] 2 W.L.R. at p. 600), "for implying

that the sellers assumed the obligation of obtaining, or of trying to obtain, the necessary licence; or, at least, that this obligation was not intended to be imposed upon the buyers."

The above reasoning should have been adequate for the Court of Appeal's decision. English law, the proper law of the contract, imposed in the circumstances the duty of obtaining the licence upon the sellers. It is respectfully submitted that the somewhat vague reference of two members of the court to Portuguese law as the *lex loci solutionis* regulating the performance of the contract was unnecessary and unfortunate. Singleton L.J. ([1955] 2 W.L.R. at p. 597) quoted with approval the following words of McNair J.: "Of course, it must be borne in mind that, even on such a finding that the proper law of the contract is English, it may still be the fact that, in so far as the performance is to be carried out in Portugal, that part of the contract has to be regulated by Portuguese law." Lord Goddard C.J. put the same more tersely (at p. 598): "I agree with McNair J. that the proper law of the contract is English, but that its performance must be regulated by the law of Portugal." Such statements as these are not self-explanatory and may possibly mean three different things:

(1) In construing a contract governed by the law of one country and to be performed in another, the court will take into account the law of that other country.

It seems unlikely that this was the intended meaning, yet it is the only one to which no exception can be taken.

(2) The law of Portugal as the *lex loci solutionis* must regulate the mode of performance.

This meaning, whilst in the abstract expressing the undoubted legal principle, cannot, it is submitted, be accepted in the case before the court. The very few English decisions in point indicate that the *lex loci solutionis*, which is not at the same time the proper law of the contract, performs only the subordinate function of regulating the method or modalities of performance, in so far as these are not prescribed by the contract. This embraces such matters as incidents of presentment and payment of a bill of exchange (*Rouquette* v. *Overmann* (1875) L.R. 10 Q.B. 525), the date at which lay days begin to run (*Norden Steamship Co.* v. *Dempsey*, *supra*), and the units of currency having legal tender (*Auckland Corporation* v. *Alliance Assurance Co.* [1937] A.C. 587). The determination of the parties' obligations under the contract with respect to obtaining an export permit, must be regarded as a matter of substance and cannot be classified as falling under the category of mode of performance without unduly extending the scope of the latter. No doubt the local law prescribes the manner and conditions of application. It must, however, be left to the proper law to provide whose duty it is to obtain the licence and what the consequences will be in case it should be refused.

(3) In the words of the American jurist, Professor Goodrich

(*Conflict of Laws*, 3rd ed., p. 342): "Matters connected with the performance of a contract are governed by the law of the place where the contract is to be performed."

This broad formulation, which inevitably results in uncertainty and imprecision, does not represent the law of this country and is contrary to the trend of recent decisions. It is, therefore, to be hoped that Lord Goddard C.J. and Singleton L.J. did not have it in mind when they made their pronouncements. An outspoken opponent of Professor Goodrich's views in the U.S.A. is Professor Lorenzen. He admits that the *lex loci solutionis* must govern the method of performance but continues (*Selected Articles*, 1947, p. 318): "As to matters connected with the performance of a contract in other respects, the question becomes, however, upon closer examination, more difficult. Many able minds . . . have found it impossible to draw a clear line of division between the rights and duties arising from the formation of the contract as such and those connected with its performance." The same sentiment is voiced in the judgment of the Privy Council in *Auckland Corporation* v. *Alliance Assurance Co.*, *supra*, delivered by Lord Wright, in which he stresses (at p. 606) that the *lex loci solutionis* is "limited to matters which can be fairly described as being the mode of performance, and is not to be extended so as to change the substantive or essential conditions of the contract." It is submitted that these words, which have received the approval of Lord Simonds, giving the judgment of the Privy Council in *John Lavington Bonython* v. *Commonwealth of Australia* [1951] A.C. 201 at p. 221, express the correct legal principle.

J. K. Grodecki.

Extermination of Rabbits—"Clean Hands" Doctrine

In a note in this *Review*, Volume 17, p. 270, it was submitted that the Court of Appeal in *Mason* v. *Clarke* had made an undue extension of the rule disentitling a plaintiff to sue when he was party to a fraudulent transaction. The House of Lords has now reversed the Court of Appeal ([1955] 2 W.L.R. 853; [1955] 1 All E.R. 914), on the ground that there was no sufficient evidence of fraudulent intention in the form in which the receipt was given, and that even if such an intention on the part of the giver of the receipt had been proved, the plaintiff, the person to whom the receipt was given, being innocent of the intention, could recover.

Glanville Williams.

The Rehabilitation of the Undivided Share in Land

Two recent Court of Appeal decisions [1] affecting undivided shares appear to have effected a silent revolution in the nature of the

[1] *Bull* v. *Bull* [1955] 1 Q.B. 234; [1955] 1 All E.R. 253; *Cooper* v. *Critchley* [1955] 2 W.L.R. 510; [1955] 1 All E.R. 520.

beneficial interests arising under a trust for sale of land. Before 1926 the trust for sale was recognised simply as a conveyancing device, a method of settlement alternative to the classical settlement by way of remainders and executory limitations. Since 1925 however, with the separation effected by section 1 (7) of the Settled Land Act and even more with the advent of the statutory trusts for sale found in section 35 of the Law of Property Act and elsewhere, the trust for sale has come to be regarded as different in kind from the strict settlement. Accordingly it has been generally assumed that under the maxim, " Equity looks upon as done that which ought to be done " the beneficial interest under a trust for sale is pure personalty, even if this involves throwing overboard some of the express limitations subject to which the property is held.[2]

This tendency was particularly marked in the transitional provisions cases immediately following the commencement of the 1925 legislation, but more recently in 1943 [3] it was emphasised that the trustees' duty was to sell unless all concurred in exercising a discretion to postpone sale; if the corpus of the trust property is land this must be regarded as a temporary phase pending an ultimate but certain sale. Now of course a statutory trust for sale arises wherever land is limited in undivided shares, and this is reemphasised by the definition of land in section 205 (1) (ix) of the Law of Property Act which explicitly excludes " an undivided share in land." It has been assumed that this is because an undivided share is now held in the proceeds of sale and is therefore money: *cf.*, Hood & Challis (1938), p. 333; Wolstenholme & Cherry (1932), vol. 1, p. 583.

Along with this is the fact that a beneficiary under a trust for sale of land (unlike the beneficiary under a strict settlement) has apparently no right to the possession of the land. Section 29 (1) of the Law of Property Act, which enables the trustees by revocable writing to delegate their statutory powers of management and leasing to the beneficiary, does not mention letting the beneficiary into possession; this power to let the beneficiary into possession pending sale has in fact been assumed, following the interpretation of a similar power conferred on the court by the Settled Land Act of 1882,[4] but there is no modern authority for the assumption. Moreover, even if section 29 (1) does have this effect the delegation is revocable.

It would appear, however, that all this has been changed by the decisions of the Court of Appeal in *Bull* v. *Bull* and *Cooper* v.

[2] *Re Flint* [1927] 1 Ch. 570; *Re Price* [1928] Ch. 579; *Re Thomas* [1930] 1 Ch. 194; and *cf. Bernhardt* v. *Galsworthy* [1929] 1 Ch. 549.
[3] *Re Mayo* [1943] Ch. 302.
[4] *Re Wythes* [1893] 2 Ch. 369; *Re Bagot's Settlement* [1894] 1 Ch. 177.

Critchley.[5] In the first of these cases it was held that the owner of an undivided share in the proceeds of sale of land, was entitled, along with the other common owner, to possession of the land itself so long as her user was not excessive or excluded the other. Basing himself on the assumption that the parties were equitable tenants in common of *land*, Denning L.J. (who delivered the judgment of the court) held that " until a sale takes place these equitable tenants in common have the same right to enjoy the land as legal tenants used to have " [6] and quoted with approval *dicta* of Maugham J. in *Re Warren* [7]: " In substance the beneficial interests of the undivided owners in regard to enjoyment so long as the land remains unsold have not been altered, and it is true to say that the ordinary layman possessed of an undivided share in land would be quite unaware of any alteration in his rights as the result of the Act."

In *Cooper* v. *Critchley* [8] the point at issue upon which the case was substantially reported was whether a contract to assign an undivided share in the proceeds of sale of land was required to be evidenced in writing under section 40 (1) of the Law of Property Act, 1925; a unanimous Court of Appeal held that it was so. Jenkins L.J. was prepared to say in any case, that a sale of one undivided share to the owner of the remainder, where the effect of the transaction would be to confer the entire beneficial interest in the property to the purchaser so as to entitle that purchaser to the unincumbered legal estate, was a sale of an interest in land. The essence of his judgment was, however, based on the interpretation of s. 205 (1) (ix) and (x), " land " and " equitable interest," and it is important to remember that it was this section only (which is of general application) and not section 40 (1) upon which the decision was based. He says, " The definition of ' land ' in section 205 (1) (ix) of the Act, does in so many words exclude an undivided share in land; but that does not, to my mind, conclude the matter. The interest here is not an undivided share in land: it is a right to a share of the proceeds to arise from a sale of land, and para. (ix) does not say that such a right is not an interest in land." [9] But if this is what section 205 (1) (ix) means, it must follow that all beneficial interests under a trust for sale of land must be regarded as land henceforth and not as mere money.

It may be, of course, that a distinction is to be drawn between the trust for sale which arises as a result of a contract for valuable consideration and that which arises by way of will or settlement. Such cases as there are which relate to the enjoyment of the land in

[5] [1955] 1 Q.B. 234, [1955] 1 All E.R. 253; [1955] 2 W.L.R. 510, [1955] 1 All E.R. 520.
[6] [1955] 1 Q.B. at p. 237.
[7] [1932] 1 Ch. 42 at p. 47.
[8] [1955] 2 W.L.R. 510.
[9] [1955] 2 W.L.R. at p. 516.

specie, *e.g.*, those in which the court has refused to compel a sale, are all " purchase " cases,[10] whereas those which lay emphasis on the character of the beneficial interest as money tend to be settlements or transitional provisions cases.[11] It is suggested that when the courts construe instruments giving rise to a trust for sale, the circumstance that it arose on a purchase for value seems to lead to the interpolation of an implied term affecting the actual use of the land. (It may be added that in both *Bull* v. *Bull* and *Cooper* v. *Critchley* the trust arose on a purchase.) Such a term is for obvious reasons less likely to be material in a settlement.

Again, since both the cases concerned undivided shares, it should also be considered whether they have affected the series of cases shortly after 1925, of which *Re Price* [12] is a typical example, which seemed to say that the statutory trusts had a peculiarly effective character in transforming land into money, over and above that possessed by the ordinary express trust for sale.[13] *Re Price* was in fact the only post–1925 undivided shares case referred to by the Court of Appeal in *Cooper* v. *Critchley* [14] but its effect was disregarded; it may be that it should be now taken to be overruled.

These conclusions may, however, be founded on too narrow an interpretation of these decisions. In fact in neither case did the Court of Appeal limit its unanimous decision. In both cases the *ratio decidendi* was quite shortly that the beneficial interest under a statutory trust for sale (and hence *a fortiori* an ordinary express trust for sale) was land and was to be enjoyed and treated as land.

The consequences of this can be far reaching indeed. The doctrine of conversion is substantially limited hereafter in its scope, but this is a small matter. What is more important is that the tenant for life under a trust for sale of land is now *entitled* not by virtue of any statutory provision but by virtue of something like an estate in the land; the trust for sale is now only a conveyancing convenience. Moreover section 28 (1) of the Law of Property Act, 1925, confers the powers of a Settled Land Act tenant for life upon trustees for sale " in relation to land . . . or the proceeds of sale thereof." This has been interpreted in the past as meaning only " the proceeds of sale of land sold by these trustees." [15] But

[10] *Re Buchanan-Wollaston's Conveyance* [1939] Ch. 738; *Re Hyde's Conveyance* (1952) 102 L.J. 58; *Bull* v. *Bull* [1955] 1 Q.B. 234; [1955] 1 All E.R. 253.

[11] See cases cited above at note 2.

[12] [1928] Ch. 579. On December 31, 1925, P. was tenant in tail special of a one-ninth undivided share in copyhold land subject to the custom of gavelkind. *Held*: the statutory trusts in s. 35, L.P.A., overrode the entail and the beneficial interest became an absolute interest in pure personalty. The particular decision on the facts was reversed by the Law of Property (Entailed Interests) Act, 1932.

[13] See cases cited above in note 2 and *cf. Re Ryder and Steadman's Contract* [1927] 2 Ch. 62. See also H. Potter, *Settlement of a Legal Estate* (2nd ed., 1948) at p. 16.

[14] [1955] 2 W.L.R. 510; [1955] 1 All E.R. 520.

[15] *Re Wellsted's Will Trusts* [1949] Ch. 296, *per* Lord Greene M.R. at p. 315.

if the beneficial interest under a trust for sale of land is itself land, then trustees who are trustees only of an undivided share in land may now invoke section 28 (1) and buy land or concur in a partition of the land concerned, whether or not they have express powers to do so.

This, it is submitted, is the logical conclusion; may we ask whether this was what the court intended?

HAMISH R. GRAY.

ONCE AGAIN: THE MATRIMONIAL HOME

SPECIALISTS in the intricacies of the principle of precedent will have a difficult task in analysing the effect, if any, of the decision of the Court of Appeal in *Jess B. Woodcock & Sons Ltd.* v. *Hobbs* [1955] 1 W.L.R. 152; [1955] 1 All E.R. 445. At first sight the case looks most important as the first decision in which the Court of Appeal has laid down that the deserted wife's right to occupy the matrimonial home binds the purchaser of the legal estate, and one wonders why the case is " starred " in the *Weekly Law Reports*. In fact, however, the decisive legal issues were never fully argued, and the authority of the case is thereby impaired. Moreover the decision has a distinctly Praetorian flavour, and may be one of those which are of a creative character for the very reason that their foundations in positive law are not clearly visible.

The husband deserted his wife, the defendant, in 1940, and left her in the house which had been their matrimonial home and which was situated at the entrance to the yard where he carried on his road haulage business. He, being the tenant, continued to pay the rent. In 1948 he bought the house, but the defendant remained there as before. In March, 1950, the British Transport Commission compulsorily acquired the business, including the house, and offered the defendant a tenancy agreement. She passed the offer on to her husband, and he replied that he was separated from her and that she was in occupation partly " as consideration for her acting as caretaker," a statement at variance with the facts which he repeated in subsequent letters to the B.T.C., trying no doubt (as Birkett L.J. pointed out) to use the defendant as a tool to have the premises rent free. The B.T.C. did not press the matter, but after denationalisation, in April, 1954, it sold the undertaking (including the house) to the plaintiffs who were informed by the B.T.C. that the defendant resided in the house rent free under arrangements alleged to have been made between the spouses that she acted as caretaker, and who bought the house subject to her occupation. Shortly after having acquired the premises, the plaintiffs sued the defendant in the county court for possession, but the county court judge, relying on the judgment of Denning L.J. in *Bendall* v. *McWhirter* [1952] 2 Q.B. 466, dismissed the action, having found that the plaintiffs

were affected by notice. He did, however, point out that in "properly framed proceedings" (by which no doubt he meant proceedings under section 17 of the Married Women's Property Act, 1882) he would be able, in his discretion, to terminate the defendant's occupation, but not in the present proceedings. On this procedural point the Court of Appeal (Denning, Birkett and Parker L.JJ.) differed from the county court judge, and held unanimously that separate proceedings were not required and that a discretion could be exercised on application for possession, and an order was made for possession in three months. It having been intimated to plaintiff's counsel that the court was in his favour on the question of discretion, he did not further seek to argue that the defendant's right was not an equitable interest or that the plaintiffs were purchasers without notice. While this weakens the authority of the case, it remains true that Denning and Birkett L.JJ. expressly held the wife's right to be an equitable interest binding purchasers of the legal estate with actual or constructive notice, a view to which Parker L.J. refused to commit himself. Even Parker L.J., however, took the view that (in certain situations at least) a *mala fide* purchaser was bound, *i.e.*, even he did not treat the wife's right as strictly personal.

That the deserted wife has, as against her husband, the right to occupy the matrimonial home, subject to the discretion of the court under section 17, is, as Denning L.J. said, "well settled." On the question of the nature of this right, *i.e.*, on whether it can bind third persons there exists the well-known controversy which is in fact a clash between the policy of protecting the wife against eviction by a subterfuge and that of protecting the freedom of alienation and the operation of mortgage credit. This is essentially the sort of problem which cannot be solved by the trial and error method of judicial legislation and which requires the intervention of Parliament, *i.e.*, an open and deliberate decision on policy.

The present case shows the confusion which now prevails. Both Denning and Parker L.JJ. expressly approved of the decisions of Jones J. in *Ferris* v. *Weaven* [1952] 2 All E.R. 233, and of Lynskey J. in *Street* v. *Denham* [1954] 1 W.L.R. 624, but, while Denning L.J. regarded them as applications of the rule that a purchaser of the legal estate with notice is bound by an equitable interest and refused to treat them as cases of collusive or "sham" conveyances, Parker L.J. sought to explain them by the "special facts" that the transactions were devices to get the wife out for the husband's benefit. But, with respect, since English law has nothing in the nature of an *exceptio doli*, how could this have been relevant, except on Denning L.J.'s explanation? On the other hand to accept that explanation means to treat as *obiter dicta* the relevant observations of Jenkins L.J. in *Bradley-Hole* v. *Cusen* [1953] 1 Q.B. 300, which Denning L.J. tried to do in the instant case but

which, it is respectfully submitted, is unconvincing. To regard *Ferris* v. *Weaven* and *Street* v. *Denham* as wrongly decided would be morally repulsive and no one has suggested it so far. The law has reached an impasse.

Nor do the difficulties end here. On the basis of the doctrine of the equitable interest, what precisely is meant by "good faith" and what by "notice"? Notice of what? The B.T.C. and the plaintiffs knew that the defendant was in occupation and that she was separated from her husband and they apparently, without making any further inquiries of the defendant herself, believed the caretaker story, which Denning L.J. regarded as "hardly credible when there was no caretaking to do." Thus, since "occupation is notice of the occupier's rights," they were bound by the defendant's equitable interest. But how far does this go? The wife's right is now increasingly regarded as not based on the marriage but on the husband's desertion. Does this mean that the purchaser must satisfy himself that the wife was guilty of constructive desertion or at least gave the husband "cause" for leaving? Is this really the law? Surely in practice the theory of constructive notice is incompatible with the view that the husband's desertion is the basis of the wife's right.

That the husband's "matrimonial offence" was the legal foundation of the wife's right of occupation, *i.e.*, that this right does not arise on marriage but on desertion was the *ratio decidendi* of Upjohn J. in *Lloyds Bank* v. *Trustee of O.* [1953] 1 W.L.R. 1460, and of Harman J. in *Barclays Bank* v. *Bird* [1954] Ch. 274, and was accepted by Denning L.J. in an *obiter dictum* in the present case. This view could, if at all, only be defended on the ground that the wife's right of occupation is an emanation of the husband's duty to maintain her, comparable with her common law power to act as his agent of necessity. This was in fact indicated by Denning L.J. in *Bendall* v. *McWhirter*, *supra*, and it may perhaps explain the decision of a county court judge in *Seel* v. *Watts* [1954] 1 C.L. 150 that the deserted husband is not entitled to rights corresponding to those of the deserted wife. But if the right is a crystallised maintenance claim how can it be based on an irrevocable licence? Surely the licence would only be found in the marriage as such and not in the desertion? And, if the right is based on maintenance, how can it be an equitable interest in the land?

As between the spouses the court can exercise its discretion under section 17. Can this section apply between one spouse and a third party? In *Bendall* v. *McWhirter*, *supra*, Romer L.J. doubted whether it could, and the *rationale* of section 17 would appear to justify these doubts: it is one thing to mitigate the rigidity of the principles of property law as between the spouses, and quite another to allow third parties to be affected by the very personal considerations which ought to and often do enter into the application of

section 17. That in certain cases a third party may make an application under section 17 is no argument to the contrary because in those cases the third party asks for a determination of rights as between the spouses themselves and not as in the instant case of a determination of his own rights against one of the spouses. Further, if all this is wrong and section 17 can be applied between one spouse and a third party, was not then the county court judge in the present case right in thinking that proceedings under section 17 must always be separately constituted, no matter whether the court is to exercise its discretion between the spouses or between one of them and a third party?

However—and this is the gravest doubt raised by the instant case—was the discretion which the Court of Appeal purported to exercise that based on section 17? Denning L.J. in *Bendall* v. *McWhirter*, *supra*, regarded the exercise of a discretion outside section 17 as possible, and in the case under review none of the three members of the court referred to section 17 as the foundation of the discretion. But, one is further tempted to ask, if the discretion did not come from section 17, where did it come from?

One is faced with the dilemma of all law. As said above, this case may be a creative application of ideas of justice. It is the misfortune of the lawyers to be for ever shocked by such creative decisions. The case cannot be fitted into the traditional categories. To say this does not mean to say that the decision was not a wise and a just one. But, let it be said once more, would it not be fairer to all concerned if the wisdom and the justice to be brought to bear on a problem of this kind was that of a democratically elected legislature in possession of the relevant facts? Once again: is it right and is it expedient to leave such matters to the hazards of judicial legislation?

O. Kahn-Freund.

Annulment of Adjudication in Bankruptcy

If a bankrupt's adjudication is annulled, can he be prosecuted subsequently for bankruptcy offences alleged to have been committed between his adjudication and his annulment?

Although it has been possible to annul bankruptcies for many years now, there appears to be no case on this particular point.

In the unreported case of *Director of Public Prosecutions* v. *Ashley* the accused was charged with two bankruptcy offences (at Leeds Assizes, March 14–24, 1955), namely obtaining credit for more than £10 while an undischarged bankrupt, contrary to section 155 (*a*) of the Bankruptcy Act, 1914; and also for managing a business without leave of the court while an undischarged bankrupt, contrary to section 187 of the Companies Act, 1948.

It was argued on his behalf by Mr. Rudolph Lyons, Q.C., that

since the annulment had been obtained before proceedings were commenced, the indictment on these two counts was bad in law. The arguments in favour of this contention are as follows—

1. There are three ways of disposing of a bankruptcy, namely: discharge, scheme or composition with the creditors, and an annulment.

Annulment is sharply distinguished from the other two. Part VII of the 1914 Act deals with bankruptcy offences, and section 162 provides—

> " Where a debtor has been guilty of any criminal offence, he shall not be exempt from being proceeded against therefor by reason that he has obtained his discharge or that a composition or scheme of arrangement has been accepted or approved."

The omission of annulment is most pointed and, bearing in mind the maxim *expressio unius exclusio alterius*, it would appear that the legislature contemplated that it was a good defence to a prosecution for bankruptcy offences.

2. Section 29 which deals with annulment, provides that annulment may be granted in two cases: (1) where in the opinion of the court the debtor ought not to have been adjudged bankrupt, or (2) where the debts are paid in full.

The procedure appears to be the same whichever ground gives rise to the annulment, and apparently both are treated with complete equality. Now it would be clearly wrong to prosecute a man for an alleged bankruptcy offence if in the first place he should not have been adjudged bankrupt at all, and since an annulment for payment of debts in full is treated exactly the same as an annulment where the debtor ought not to have been adjudged bankrupt, it would seem to follow that the effect of annulment is to wipe out all bankruptcy offences alleged to have been committed between the bankruptcy and the annulment.

3. There is an authority, *Bailey* v. *Johnson* (1872) L.R. 7 Exch. 263, where Cockburn C.J. says at page 265—

> " The effect of section 81 [of the Bankruptcy Act, 1869, which deals with the effect on property of an annulment] is subject to any bona fide disposition lawfully made by the trustee prior to the annulling of the bankruptcy, and subject to any condition which the court annulling the bankruptcy may by its order impose, to remit the party whose bankruptcy is set aside to his original situation."

Although the learned Chief Justice was not dealing with criminal offences, nevertheless the same reasoning ought to apply. These arguments did not prove acceptable to Mr. Justice Byrne who tried the above case. His view was that if annulment was a good defence to a prosecution, then it would be possible for a man to borrow the full amount of his debts without disclosing he was a bankrupt, to pay off all his debts and obtain an annulment, and

nevertheless be free from prosecution for the offence he had committed with the object of getting money to get his annulment.

This undoubtedly would be an anomaly, but does not appear to be a very strong argument in face of the precise words of sections 29 and 162. Evidently it is the policy of the Bankruptcy Act to encourage the bankrupt to pay off his debts in full. The inducement to do this is that, if he pays his debts in full he gets an annulment—that is to say, the whole of his bankruptcy is wiped out and he is reinstated to his former position, and he is therefore, it is submitted, free from prosecution. The Act does not say in terms that the annulment shall be a defence for bankruptcy offences, although section 29 does give certain effects of the annulment with regard to the revesting of property.

It is a pity that the Act is silent on the effect of an annulment on criminal offences. One has to glean the effect from hints and inferences. The result is a moot where the arguments for and against are very evenly balanced.

Lionel Rosen.

Sovereign Immunity

It is not usual to review in these pages American decisions, but the decision which the Supreme Court of the United States rendered on March 7, 1955, in *National City Bank of New York* v. *Republic of China*, 23 (1955) U.S. Law Week 4111, is of such exceptional importance to the international development of the law of sovereign immunity that it should at once be brought to the notice of British readers.

The Republic of China brought an action against the defendant bank to recover a sum of money standing to the credit of a deposit account for the Shanghai-Nanking Railway Administration, one of the plaintiff's governmental agencies. The bank counterclaimed for an amount equivalent to that of the claim, which was alleged to be outstanding on certain Treasury Notes issued by the plaintiff Republic in 1920 and 1948 respectively. The lower courts dismissed the counterclaim on the ground that it did not arise out of the matter in dispute in the action. This reasoning was in harmony with earlier American decisions (though the point had never been considered by the Supreme Court), with English practice (see, in particular, *South African Republic* v. *La Compagnie Franco-Belge du Chemin de Fer du Nord* [1898] 1 Ch. 190, and *Union of Soviet Republics* v. *Belaiew* (1925) 42 T.L.R. 21) and, indeed, with what was thought to be a generally accepted principle (see, *e.g.*, Arts. 5 and 6 of the Draft Convention on Competence of Courts and comments thereto (Harvard Research) in *American Journal of International Law (Official Documents)*, *1932*, 455 *et seq.*). Yet by a majority of four to three (Reed, Burton and Clark JJ. dissenting,

and Douglas J. not taking part in the consideration or decision of the case) the Supreme Court reversed and reinstated the counterclaim.

Mr. Justice Frankfurter, who delivered the opinion of the majority, attached much importance to the municipal law of sovereign immunity: since the Republic of China could sue the United States in an American court, " it seems only fair to subject a foreign sovereign, coming into our courts by its own choice, to a liability substantially less than our own Government long ago willingly assumed." Moreover the National City Bank could sue the Republic in a Chinese court, but " no parochial bias is manifest in our courts which would make it an affront to the ' power and dignity ' of the Republic of China for us to subject it to counterclaims in our courts when it entertains affirmative suits in its own." The *ratio decidendi* lies in the following sentences—

> It is recognised that a counterclaim based on the subject-matter of a sovereign's suit is allowed to cut into the doctrine of immunity. This is positive proof that the doctrine is not absolute and that considerations of fair play must be taken into account in its application. But the limitation of " based on the subject-matter " is too indeterminate, indeed too capricious, to mark the bounds of the limitations on the doctrine of sovereign immunity. . . . No doubt the present counterclaims cannot fairly be deemed to be related to the Railway Agency's deposit of funds. . . . The point is that the ultimate thrust of the consideration of fair dealing which allows a setoff or counterclaim based on the same subject-matter reaches the present situation.

This is a decision which must frankly be described as revolutionary. In the first place it invokes municipal practice rather than international law and does so to a much greater extent than was usual in the past or at any rate prior to Judge Lauterpacht's article in 28 (1951) *British Year Book of International Law* 220, to which express reference is made in the opinion. Secondly, the decision deviates from the rule of immunity, albeit for the limited purpose of a counterclaim, on account of " the ultimate thrust of the consideration of fair dealing,"—an argument that is wholly new to the law of sovereign immunity which has only too frequently been characterised by manifest and even shocking unfairness (see (1949) 12 M.L.R. 494; (1952) 15 M.L.R. 220). The emphasis on fair play is the more remarkable as there is no logical answer to the question pertinently asked by Mr Justice Reed in the dissenting opinion: " If a direct suit cannot be brought against a foreign sovereign (as is conceded), why should we allow the same claim to be used as an offset to destroy the sovereign's right to recover? " Thirdly, however, there is the really unique fact that in the view of the whole court the Treasury Notes upon which the counterclaim rested were " sovereign obligations, *jure imperii* in form, of the

highest public character." In view of the well-known changes in the policy of the Executive which were announced three years ago (see Department of State Bulletin xxvi (1952), 984), it would not have been surprising if, irrespective of the existence or absence of a connection with the subject-matter of the claim, the Supreme Court had allowed a counterclaim to proceed which was based on acts *jure gestionis*. But to allow a counterclaim which is independent of the claim and, in addition, arises *jure imperii* is a departure the consequences of which cannot yet be assessed.

F. A. Mann.

REVIEWS

WINFIELD ON TORT. Sixth Edition. By T. ELLIS LEWIS. [London: Sweet & Maxwell, Ltd. 1954. xl. and 836 pp. (with Index). 50s. net.]

DR. LEWIS'S task in producing this new edition of Winfield has clearly not been a light one, for apart from the considerable changes made necessary by developments in the law of tort since Winfield's own last edition, he has had to reconcile a proper respect for a distinguished text with the need for some overdue revision and expansion. The topics that have undergone most change are: *volenti non fit injuria*, the liability of the Crown and its subordinates, master and servant, contribution between tortfeasors, death, defamation, licences, negligence and contributory negligence, dangerous land and structures, and interference with contract. For the most part, Dr. Lewis's changes have been worked smoothly into Winfield's text; at only a few points do the editorial insertions read strangely. One of these is the section on the foundation of tortious liability, where Dr. Lewis's conclusion that there is no general principle of liability in English law, though probably correct, is hardly reconcilable with Winfield's own view, preserved in the text, that from the broader aspect there *is* a general principle of tortious liability in English law. Another is the topic of remoteness of damage. Whereas Winfield was prepared to accept the full implications of the *Polemis* rule and suggested that physical consequences were not too remote if they followed "in accordance with scientific laws known to govern the world," his editor has introduced passages which suggest that problems of remoteness cannot be solved by any such mechanical test. Thus he quotes Prosser's recent opinion that, all the suggested tests having been tried and found wanting, there is no substitute for dealing with the particular facts of each case, while his own conclusion is that "the solution is based upon some inarticulate idea of policy, some intuition which comes from long training and a comprehensive judgment in working out rules of law."

Dr. Lewis differs from Winfield in thinking that liability for nervous shock is a separate tort, though he continues, notwithstanding, to discuss nervous shock in the section on remoteness of damage. It is a little difficult to understand why he has chosen to differ from Winfield on this point, particularly since Denning L.J. in *King* v. *Phillips* went out of his way to deny the view he puts forward. The dicta in the cases to the effect that the infliction of nervous shock is a tort were directed to making the point that damages are recoverable for injury caused by nervous shock alone, and not only when the shock is coupled with direct physical injury, and do not really support the view that the infliction of injury through shock is a separate tort. Further, it is hardly true to say that a majority of the House of Lords in *Bourhill* v. *Young* were of the opinion that only those persons within the range of foreseeable injury by direct impact could sue for nervous shock, for a close reading of the case shows that Lords Thankerton, Porter and Wright all thought that the duty depended on general foreseeability of harm to the plaintiff, either by impact or shock. This was the interpretation put upon the case by the Court of Appeal in *King* v. *Phillips*, and it is further supported by the decision of Donovan J. in *Dooley* v. *Cammell Laird & Co., Ltd.* ([1951] 1 Lloyd's Rep. 271), which is not noted in this edition.

The section on master and servant has been expanded and improved. Dr. Lewis is of the opinion, despite recent cases, that control over the way

in which work is done is still the most important factor in determining whether an agent is or is not a servant for the purposes of vicarious liability. Fuller and better treatment is given to the problems that arise from lending a servant. Despite the abolition of the doctrine of common employment, one still finds the liability of employers *towards* their servants discussed in a general chapter on capacity, which would seem hardly defensible. The chapter on negligence would appear to be the proper place for a discussion of employers' common law liability, unless indeed the topic be reckoned sufficiently important to merit a separate chapter of its own. It is also difficult to appreciate the relevance in a general textbook on the law of tort of an account of the benefits to which employed persons are entitled under the National Insurance (Industrial Injuries) Acts, since the obligation to pay compensation in the event of injury is no longer placed on the employer, but is assumed by the State.

As one would expect, there are considerable changes in the chapter on negligence. Winfield's treatment of this topic was inclined to be inadequate in his later editions. Dr. Lewis recognises, as Winfield did not, the many difficulties in the way of accepting Lord Atkin's "neighbour" principle as the criterion of whether or not a duty of care exists. He enumerates many of the situations and relationships in which the courts have denied the existence of any duty to take care. His conclusion is that if a situation or relationship is not covered by authority the judge's choice whether to apply the "neighbour" principle or to create some new exception to it is not capable of prediction. "The factors which guide the judge in this creative process can only be put broadly as the application of theories of justice to negligence cases by adjusting the relative values of the conflicting interests involved." On this view, Lord Atkin's "neighbour" dictum is not so much a guiding principle in the decision of cases as a safe refuge for a judge wishing to hold for the plaintiff. Another new and welcome feature is a discussion of some of the more important factors which determine the standard of care that must be taken, such as the magnitude of the risk and the likelihood of injury, the importance of the object to be attained, the practicability of possible precautions, and general and approved practice. The omission of the factor of profit or advantage to the defendant is a little surprising. It is this factor that turns a licensee into an invitee and determines the standard of care required of the transferor of dangerous chattels. This being so, one would expect it to be an important consideration in determining the standard of care required of a defendant in the tort of negligence.

Whereas Winfield regarded liability for dangerous structures as a species of strict liability, Dr. Lewis prefers to regard it as "a special subhead of the general doctrine of negligence," though the chapter on dangerous structures is still found in the section of the book devoted to strict liability. One would like to suggest that both dangerous structures and dangerous chattels might well be treated immediately after the tort of negligence. In the section on the duty owed to contractual licensees, Dr. Lewis finds it difficult to accept the suggestion made in some of the cases that the occupier merely warrants that he himself has taken reasonable care that the premises are safe, for, as he points out, even towards an invitee the occupier is answerable for the negligence of an independent contractor. He is also critical of the view expressed in *Bell* v. *Trayco Hotels* that a higher duty may be owed in respect of one part of the premises than in respect of another as an attempt to erect into a distinction of law what is in fact a distinction of fact, the single standard of reasonable care requiring greater precautions to be taken in respect of one part of premises than in respect of another if, for example, the one part is more frequented than the other. Some confusion seems to have crept into the account of the immunity from liability of the vendor or lessor of a house for injuries sustained by those entering it. Dr.

Lewis states quite correctly that this immunity does not apply where the defendant retains occupation of part of the premises and the plaintiff, on entering that part of the premises, suffers injury from a defect there. But it is incorrect to cite *Cunard* v. *Antifyre* in illustration of this point. The plaintiff in that case did not enter the part of the premises retained by the defendant. A piece of guttering fell from a roof in the occupation of the defendant, injuring the plaintiff on another part of the premises demised to her husband, and the defendant was held liable to her, not as occupier towards a visitor, but in negligence.

Dr. Lewis deduces from *London Graving Dock* v. *Horton* that "the invitor owes no duty to an invitee who has full knowledge, and what was hitherto a question of fact has now become a proposition of law." But is this not to accord the case a wider principle than is strictly necessary? It was admittedly the view of Lord Normand and Lord Oaksey, but the third member of the majority in *Horton's* case, Lord Porter, accepted the view that it had to be shown that the invitee not only knew of the danger but accepted the risk, though it need not be shown that in accepting the risk the plaintiff was free from economic constraint. From Lord Porter's judgment at least it by no means follows that mere knowledge of the danger will in every case defeat an invitee. His judgment is quite consistent with the view that an invitee with full knowledge of the danger may yet recover if in view of the object he sought to achieve it was reasonable for him to expose himself to a known risk. This would permit the application of the principle of the "rescue" cases to private premises, whereas it is difficult to see how it can apply if knowledge of the danger in every case defeats an invitee. It is submitted that the *ratio* of a decision of a bare majority should be restricted to the narrowest ground chosen by any member of the majority, otherwise the effective decision in the establishment of new rules would lie with a minority of the court.

There are many other substantial changes in this edition. The section on the liability of the Crown has been largely rewritten; the Defamation Act, 1952, has been incorporated smoothly into the chapter on defamation; and there is an excellent account of the tort of interference with contract in the light of *Thompson* v. *Deakin*. This edition is some one hundred pages longer than the last. Some may regret this, but the book is certainly more comprehensive than it was before. In future editions Dr. Lewis will no doubt feel freer to prune the original text. A good deal of space could be saved by omitting the historical treatment of such topics as remoteness of damage and conspiracy.

A few misprints have been noted. The quotation from the judgment of Andrews J. in the *Palsgraf* case on page 75 is wrong: it represents the sense of what he said, but not his actual words. "Inconsistent" on page 81 should be "consistent." Quotation marks are omitted from the end of a quotation on page 86. A number of cases have been put in the wrong footnote on page 143. The Pedestrian Crossing Places (Traffic) Regulations, 1941, mentioned on page 252, were repealed and replaced by the Pedestrian Crossing (General) Regulations, 1951. On page 268 the decision in *Wilkinson* v. *Downton* is still, as in the last edition, imputed to Lord Wright. A reference to Salmond on page 322 is wrong. *Cohen* v. *N.R. Bank* on page 428 should be *Re Cohen*. A paragraph on the scope of the *Searle* v. *Wallbank* exemption appears to have been omitted by oversight from the chapter on liability for animals. The reference to *Haseldine* v. *Daw* on page 683 is incomplete. Two footnotes are missing on page 687. Lastly, a certain amount of foreign matter has got into a quotation of Lord Sumner's on page 700.

Douglas Payne.

Clerk & Lindsell on Torts. Eleventh Edition. By A. L. Armitage, M.A., LL.B., G. Ellenbogen, M.A., His Honour Judge Charlesworth, LL.D., T.A., Blanco White, B.A. [London: Sweet & Maxwell, Ltd. 1954. clvi and 1019 pp. £4 15s.]

This is the third standard work on the law of torts to appear in the last two years under new editorship. Whereas the late Professor Potter was general editor of the last edition (though others contributed particular chapters), a team of four editors is each responsible for his own part of the new edition.

Clerk and Lindsell has always been an outstanding practitioners' book, in that it has not been content merely to collect a string of cases, but has aimed at a synthesis of them. In this regard, it was a sound decision to retain almost intact the introductory chapter on the general principles of tort which Professor Potter wrote in the last edition. His Honour Judge Charlesworth's Chapter on Negligence is an excellent example of the positive and constructive approach of this work. He has not attempted to explain all the various ways in which judges handle cases of negligence. Instead, he has plumped for the view of Denning L.J. in *King* v. *Phillips, viz.*, once a duty of care owed to *somebody* has been broken, the plaintiff succeeds unless his damage is too remote—duty is general, and is not owed merely to those in some "imaginary danger area." And the writer does not shirk the consequences of his view: he states (at p. 349) that "in so far as *Bourhill* v. *Young* (a Scots appeal) decided that Young owed no duty of care to the fishwife it was wrongly decided according to English law," and (at p. 350) that *Owens* v. *Liverpool Corporation* "was not, and could not be, overruled by *Bourhill* v. *Young*." Whether or not one agrees with these conclusions, one cannot help but admire the fresh and forthright style. In this section, and in the admirable discussion of contributory negligence, there is a proper emphasis on recent decisions and the judicial trends which they reveal.

Another outstanding contribution is Mr. Armitage's chapter on Defamation. There might, however, have been rather more examination of the difficulties raised by the Defamation Act, 1952, in the style of his discussion of the effect of that Act on *Alexander* v. *Jenkins*; and the treatment of remoteness in defamation might also have been expanded. His chapter on injurious falsehood is of equal merit: someone, however, who is unfamiliar with *Ajello* v. *Worsley* may not realise, when he reads (at p. 848) that "the defendant . . . falsely advertised (etc.) . . ." that the defendant was held not to have been guilty of fraudulent conduct. Mr. Blanco White has written a lucid account of copyright, patents and trade marks. Sometimes, however, he regards cases from other spheres (*e.g.*, trade marks legislation) as authorities on passing-off, and fails to mention that they deal with a different subject-matter, *e.g.*, *Gramophone Co.'s Application* (at p. 994).

Candour compels one to state that many other chapters fall well below this high level. Thus, the section on Interference With Contract compares unfavourably with corresponding chapters in Winfield and Salmond. The exposition of Death presents a sharp contrast. Mr. Armitage, in his well-written section on Survival of Causes of Action (which, curiously enough, is to be found in a chapter entitled Trespass to the Person, and is separated by some two hundred pages from the Fatal Accidents Acts, which are in a chapter headed "Parties"), has corrected most of the errors—on *Benham* v. *Gambling*, *Feay* v. *Barnwell* and the rest of the cases—which marred the last edition. On the other hand, Mr. Ellenbogen's treatment of the Fatal Accidents Acts is meagre—the important practical problems raised by such recent cases as *Bishop* v. *Cunard White Star* and *Bowskill* v. *Dawson* have been entirely neglected. It is perhaps worth noting that whereas three-fifths of Winfield's sections on Death deal with the Fatal Accidents Acts, the proportion in Clerk and Lindsell is less than one third.

Nor does the attempt to subsume the rules of negligence in relation to

"dangerous" chattels and the rule in *Rylands* v. *Fletcher* under a common heading of "Dangerous Property and Things" seem satisfactory. We are told, for example, that *Donaldson* v. *McNiven* decided that an air rifle is not a "thing" to which the rule in *Rylands* v. *Fletcher* applies (at p. 618). Nor is it easy to reconcile the following statement with the decided cases: "If the dangerous thing escapes, it is no defence to say that it is a natural or ordinary use of the land to have such a thing upon it" (at p. 619). The statement (at pp. 19 and 621) that damages for personal injuries are recoverable in private nuisance should have been backed by the authority on which the editors rely. Although it is true that an action other than that derived from public nuisance lies when a right of access is interfered with, the cases establishing that proposition do not, as is stated at p. 591, decide that the tort thus committed is private nuisance. One would have preferred some authority for the proposition (p. 561) that an individual who suffers particular loss as a result of a "statutory nuisance" under the Public Health Act, 1936, has a cause of action in tort. At p. 570 it is stated that "there is no liability when the nuisance is caused by . . . an occurrence which could not be prevented by the exercise of care . . .", but five pages later we read: "once the wrongful act of nuisance is proved, it is no defence to prove that it was impossible to prevent it by the exercise of care."

The treatment of remoteness of damage is inadequate. Developments since the last edition are not given due consideration—especially, the inter-relation of problems of causation in contributory negligence and remoteness of damage is ignored. Cases such as *Jones* v. *Livox, Stapley* v. *Gypsum Mines, Cork* v. *Kirby MacLean, Sigurdson* v. *British Columbia Ry.* are omitted: to omit these so as to give pride of place in this section on remoteness to *Neville* v. *London Express* seems strange indeed. In view of the quotation on *Bourhill* v. *Young*, above, it is surprising to read at p. 178 that, even though the plaintiff suffers damage as the result of the defendant's careless act, he will fail unless a duty is owed to *him.*

Other points may be mentioned at random. There is an unfortunate omission from section 40 of the Civil Aviation Act, 1949, of the exception in favour of Her Majesty's aircraft (at p. 518); in view of section 2 of the Crown Proceedings Act, 1947, it is misleading to state that "prima facie a constable is the servant of the Crown" (at p. 271); your reviewer disagrees with the interpretation of *Whiteley* v. *Hilt* (at p. 452) and of *Skilton* v. *Epsom U.D.C.* (at p. 601). The following statements are questionable: "the action of trespass does not lie for injuries received on the highway" (p. 369); "the degree of care to be taken does not depend on the physical or mental characteristics of the person who owes the duty of care, who is supposed to be normal in these respects" (p. 358) (is this really so in the case of, say, infants and blind persons?); "unless damage is suffered as a result of the breach of statutory duty no action will lie" (p. 1015); no action lies in cattle trespass for injury to chattels (pp. 655–6). Cases omitted from both the last and this edition include *Howard* v. *Harris, Hewitt* v. *Bonvin, Parry* v. *Aluminium Corporation, Vicars* v. *Wilcox.* New cases which deserve inclusion are *Pearson* v. *Rose & Young, Martin* v. *L.C.C.* (1947), *Jerome* v. *Bentley, Cohen* v. *National Provincial Bank, Blankley* v. *Godley, Grinstead* v. *Hadrill, Watts* v. *Enfield Rolling Mills, Smith* v. *Baveystock, Pike* v. *Waldrum, Short* v. *Henderson, Stevenson* v. *MacDonald, Navarro* v. *Moregrand.* Section 8 of the Visiting Forces Act, 1952, should also have been dealt with.

Taking the book as a whole, there is that same high general level of accuracy (the revision of the first sentence on implied consent at p. 264 is an excellent example of the care taken), full and reliable citation of authorities, and extremely good index which those familiar with it have come to take for granted. The work has been much improved by the sub-division into numbered paragraphs. On some topics, such as public officers and distress, it provides material not to be found in other works on tort. The next edition

would perhaps benefit from a reversion to the previous practice of having one senior editor in the saddle—for instance, there is no clear policy in citation of periodicals and Commonwealth and American cases, and inconsistencies in the views of the several editors have not been tidied up.

The final conclusion must be that the new Clerk & Lindsell is very good value at £4 15s.

Harry Street.

Criminal Law: The General Part. By Glanville L. Williams. [Stevens & Sons, Ltd. xliv and 736 pp. £3 3s.]

When this reviewer was at Oxford many years ago, imbibing his first draft of the common law, it used to be said that "an ounce of judicial decision is heavier than a pound of academic theory." The lesson so firmly taught is vital and salutary; it is true and yet, reading through Professor Glanville Williams' *Criminal Law: The General Part,* one is reminded that it is not the whole truth. Sooner or later in any one field, the vast mass of judicial decisions is no longer to be measured in ounces; it hangs round the lawyers' necks with the weight of tons. Students are confused; practitioners uncertain in their advice to clients. A judge who decides an individual case does not, as Professor Glanville Williams says in a specific context, feel called upon necessarily to resolve the muddle of established but irreconcilable decisions and dicta. But even for the courts every attempt to cut a path through this jungle, wholly unsupported by guiding principle, involves the risk of adding further complications to a position already sufficiently obscure. Or, at the other end of the scale, faced with a question on which there is none or only the flimsiest authority, in the lacunae of the law, all concerned cannot but be grateful even for half an ounce of universally agreed theory, for something to hold on to.

It is the avowed purpose of Professor Glanville Williams' magisterial treatise "to search out the general principles of criminal law (that is to say those principles that apply to more than one crime) . . . which are conveniently described on the Continent as 'the general part' of the law." The work thus raises the question whether, despite the well-known reluctance of English lawyers of earlier generations to embark upon any discussion of abstract theory, the criminal law of this country can be considered to be based on a set of reasonably coherent principles at all, and in how far it is now capable of being presented in the form of statements of such accepted and valid principles.

To suggest that the careful reader may not arrive at a wholly affirmative answer to this question is not in any way to derogate from the outstanding value of this highly significant and important contribution to English legal literature. On the contrary it can almost be said that Professor Glanville Williams, by gathering together and discussing at length some two thousand cases in order to discover with some scientific exactitude what general considerations underly our criminal law, has broken new ground which is sure to yield a fertile harvest. True, each one of the individual fields: the objective and the subjective (mental) elements which must be present to constitute a punishable criminal offence, inchoate offences, participation in crime, corporate responsibility as well as the various grounds which may negative criminal responsibilities or justify an act otherwise criminal all these have been gone over before in numerous separate studies and in introductions to textbooks. But this careful overall survey of the present position, based as it is on minute and acute analysis of each individual problem and set in the context of modern penological and psychiatric thought, offers not merely a much fuller exposition than has yet been assembled in any single volume in this country (the situation in the U.S. is more favourable) before.

It draws the subject together and treats it, almost for the first time, as it deserves and requires to be treated: as one of the greatest and most urgent practical significance in its own right, not as an introduction, or an appendix, to the discussion of specific crimes, but as one which, at every point, is essential and indispensable to a proper understanding and adequate application of the law of crime.

In all codified systems the exposition of the various offences implies certain general exceptions, qualifications and defences not expressly enumerated and repeated for each individual crime and these are placed together in the General Part. It is plain that in drafting a statute it is impossible to state expressly all the exceptions that may be intended and even the definition of any given crime at common law must be read subject to such overriding qualifications. In English law the question is to discover exactly what these exceptions and qualifications are. The whole conception of a general part to our criminal law being fairly new (and not, as on the Continent, well established and defined), it must be to some extent an individual matter what is to be included and what is best left out. Professor Glanville Williams in his *Criminal Law: The General Part* gives no overall plan of how he intends to lay out his exposition and it is accordingly not always easy to gather why any particular chapter should follow another. Nor is it immediately obvious how for instance the subject of "superior orders" (which is not to be found in the Index at all) should be treated under "Ignorance of Law" (pp. 389 *et seq.*), though a case can no doubt be made for this arrangement. Certain topics one might look for in a discussion of the "general part" of the criminal law are not to be found here: thus the only reference to time limit on prosecutions which I have been able to discover is one which says that accessories are entitled to the benefit of any time limit established by statute for the crime committed by the principal; there appears to be no mention whatever of the fact that an act in every other respect punishable may go free because of territorial restrictions limiting the jurisdiction of the courts. Details of consent and provocation, we are told, "are best considered in connection with particular crimes" (p. 609).

If statements of accepted and valid general principle in English criminal law are to be formulated and presented, they must be gathered from the decisions of the courts alone, decisions which were primarily, or even exclusively, concerned to do justice in the individual case, not to establish a coherent theory. "The desire of the judges to punish scoundrels who do not fall fairly within the net of the criminal law has always been a source of trouble in after years," Professor Glanville Williams rightly says in connection with *Prince,* and there are indeed numerous cases, of which *Dudley* is perhaps the most notorious, where emotional disgust or merely the extreme desirability of a conviction in particular circumstances have tended to produce a crop of unfortunate dicta and even to make bad law. But even what appears on good grounds to be bad law is law for the time being, and it is only on the assumption that the trenchant and convincing criticism which he directs against certain decisions of general principle has actually annihilated certain standing authorities which enables the author to assert, for instance, "somewhat confidently that the defence [of necessity] is recognised in English law." He may be right and it is devoutly to be wished that he is, but there is little authority for this view and most of the leading textbooks and practitioners' handbooks take a rather different line. The proposition that the accused should be acquitted because he has chosen what he considered the lesser of two evils in committing a crime is one which few defence counsel, if any, seem to have been bold enough as yet to argue. It seems more safe to say that, while no plea of necessity has succeeded in English courts since *Dudley,* in practice in certain cases prosecution is never brought.

The problem is not restricted to common law defences. Even where the legislator has intervened in the criminal law judges have, in the absence of a

"general part," failed to adhere to any one principle of interpretation. "It is hard to resist the impression," the author writes in connection with decisions based on absolute or, as he would prefer it, strict responsibility "that many decisions depend simply upon idiosyncrasy. The various precedents cannot be reconciled by comparing the words of the statutes on which they were decided, because sometimes they go different ways on similar wording by reason of an assumed difference of social policy underlying the statute. . . . The outcome of all this is uncertainty and complexity."

It is the outstanding value of a work of this kind, and of this work in particular, that, by a full discussion of the general consideration which can be deduced from individual cases, it will in turn help to establish a body of varied general principles which must guide *all* decisions.

Although this is the work of a distinguished academic lawyer on a subject which still tends to be considered an "academic" one, what strikes one again and again in this book is the significance of what Professor Glanville Williams has to say to the application of the law in the practice of the courts. Thus, to give an instance, the author states rightly in his detailed discussion of the ubiquitous public welfare offences that: "there does not seem to be any instance of strict responsibility at common law, nor does there seem to be any statute that creates it in so many words." After a severe weighing up of the arguments for and against penalising conduct without reference to the mental state of the accused he proceeds to a careful discussion of the various crimes to which liability without fault has been attached. This examination enables him to suggest with some force of conviction that "it is not at all certain that this [development] is to be put wholly at the door of the legislator, for in none of the statutes was strict responsibility expressed and in some it was not even fairly implied." Again, in the chapter on children and young persons, discussion of mental factors and problems in juvenile delinquency enables him not merely to show up the irrational nature of the law which saddles with criminal responsibility children of the absurdly low age of eight, but to point out also that this lamentable approach is by no means a theoretical blemish only; in fact it comes as a shock to learn that "at present more than one in every hundred boys under the age of 14 is found guilty of an indictable offence." All these matters very properly belong, no less than questions concerning say knowledge and intent, to the general part of the criminal law such as it is envisaged and treated here by the author, to a searching out of the underlying policy and principles.

In a review of the leading practitioners' handbook on criminal matters, Professor Glanville Williams suggested in these pages some years ago with considerable justification that "if there is any obscurity in the present law, it may safely be assumed that Archbold will not lighten it." It might be said, not unkindly that, wherever there is any obscurity in the law, and wherever the law is apparently in an unsatisfactory state, Professor Glanville Williams regards it as something of a personal challenge to employ his wide knowledge and powerful intelligence to iron it out forthwith. The result is often brilliant anticipation (what is said, *e.g.*, in the arguments against *Manley* has since been confirmed almost word for word by the Court of Criminal Appeal in *Newland*, decided after the MS. was completed); it is always stimulating. The only reservation which must be made is that this treatise does not—or not yet—invariably represent what would on the Continent be known as generally accepted "dominant opinion."

It is an important merit of this work that, dealing with general principles for which sometimes there is not yet even any accepted nomenclature, it has on the whole handled the complex question of terminology with clarity and success. Perhaps it is too much to hope that, in the attempt to bring the criminal law to the touchstone of modern psychology, such terms as "super-ego" might be avoided in a legal textbook; even the printer's devil, it will be found, has risen in horror against "affectual malnutrition" (p. 658), and

it is only by a sleight of hand that an *Agent Provocateur* can be turned into a "provocative agent" (p. 620).

In the preface to his book, Professor Glanville Williams expresses the hope that he will be able to follow it with a companion volume on specific crimes. But as an exposition and discussion of general considerations and principles underlying the treatment of all or most crimes in our courts his *Criminal Law: The General Part*, to which he brings all his sharp analytical acumen, is bound to hold a paramount place in legal literature in its own right. There is hardly a book of which it can be said with more justification that it is "complete in itself" than of this volume, every page of which can help to throw light and clearer understanding on vexed details of individual crimes.

H. A. Hammelmann.

Archbold's Criminal Pleading, Evidence and Practice. Thirty-third Edition. By T. R. Fitzwalter Butler and Marston Garsia. [London: Sweet & Maxwell, Ltd. 1954. cxciv and 1691 pp. (with index), including Cumulative Supplement to the end of 1954. £4 10s.]

Archbold is not a work designed for use by those who desire to learn the criminal law or read about the theory of criminal jurisprudence; rather it is meant for quick reference or consultation in court by the practitioner, as the editors remark in the Preface to this, the thirty-third edition. It is a ready-reference book which can be resorted to with confidence and without too much difficulty and loss of time, and is intended to contain a clear statement of the rules, doctrines and principles of the subject, together with abundant authority in support. In a book of this sort, clarity and wealth of detail are more precious qualities than great learning and critical analysis. It is by these standards that the work must be judged, and there can be no doubt that it represents a very remarkable achievement in the way of compression and distillation of the rules governing criminal pleading, evidence and practice. Nevertheless, even judged by reference to the needs it is designed to meet, it is submitted that the present edition leaves much to be desired.

The learned editors inform us that an endeavour has been made to rewrite certain parts of the text where they considered that insufficient weight had been given to the trend of modern decisions, and they instance the chapter on homicide. Here there are welcome signs of a desire to render Archbold more useful, *e.g.*, on such topics as constructive murder where the scope of the doctrine has been defined in the terms adopted in Stephen's *Digest*. But this is not enough: there are still far too many blemishes in this chapter to satisfy the critical reader. Why, for example, should it be said that it is manslaughter to commit certain kinds of unlawful acts which accidentally cause the death of another (pp. 923–4) when at page 946 it is asserted that the doctrine of constructive manslaughter has been abolished by virtue of *Andrews* v. *D.P.P.* [1937] A.C. 576?

We are also told that there has been some rewriting in the chapters on False Pretences and Unnatural Offences, where it seemed that "the ingredients or some of the aspects" of the crimes "might be dealt with in a more lucid or logical manner than hitherto." This is very commendable, and the only regret is that more extensive rewriting could not have been undertaken. In addition there are some improvements in the lay-out of the text, such as the introduction of numbered paragraphs and a greater number of thick type headings for easy reference. The result is that Archbold is now a more useful working instrument than ever before.

However, it is still a regrettable feature of the book, as was pointed out in Professor Glanville Williams' review of the previous edition, 14 M.L.R.

233 (April, 1951), that doubtful statements of principle are frequently reproduced without comment, and doubtful decisions are quoted as if they were unquestioned authorities. It seems to this reviewer that this practice must rest on the debatable assumption that those who are likely to use the book can be relied upon to realise its limitations and that they will review the rules of law critically without any prompting from the learned editors. One would feel happier if only there could be inserted more often the cautionary phrase *sed quaere*.

For example, *Walters* v. *Lunt* (1951) 35 Cr.App.R. 94 is quoted twice in the text, each time with reference to a different report, as authority for holding that where a child under eight has unlawfully acquired property which he hands to his parents, the parents cannot be guilty of receiving, as the property has not been stolen (p. 14 and p. 783). There can be no objection to this statement, though one may be permitted to speculate whether the decision in *R.* v. *Bourne* (1952) 36 Cr.App.R. 125 has not altered the position. What is surprising, however, is to see twice repeated the *obiter dicta* of Lord Goddard C.J. to the effect that the parents in *Walters* v. *Lunt* might have been guilty of larceny as a bailee or larceny by finding; this is reproduced without any qualification or hesitation whatever. So also the handling of the *Bourne* case mentioned above is without comment or any reference to places where comment may be found. Again, *Gott* v. *Measures* [1948] 1 K.B. 234 is accepted without question. Occasionally the text exceeds our expectations, as where it recognises the doubtful basis of the decision in *R.* v. *Jones* (1948) 33 Cr.App.R. 11, being inspired by Mr. Turner's comments in the new Russell (p. 545), or where it espouses that learned scholar's test of the *actus reus* of attempts, despite the fact that it has not been expressly formulated in any judgment (p. 1489). As Professor Glanville Williams has observed, acceptance in Archbold is half-way towards official adoption (*Criminal Law: The General Part*, p. 483).

One or two small points may be noted in conclusion: No authority is given at pp. 186–7 for the change in the form of oath sworn by the jury; the authority is, of course, the Lord Chief Justice's Memorandum of November, 1948, for which see Tudor Rees & Graham, *The Criminal Justice Act, 1948*. The mistake in the spelling of *Weiow* (p. 1386) is repeated from the previous edition. For the correct spelling, verified from the transcript, see Edwards, "*Mens Rea* and Bigamy," *Current Legal Problems 1949*. The discussion of duress and *R.* v. *Steane* [1947] K.B. 997 is too brief to be of much assistance (p. 22).

J. E. Hall Williams.

Bankruptcy in Private International Law. By L. J. Blom-Cooper. London. 1954. [Printed by The Eastern Press, Ltd. xii and 159 pp. No price quoted.]

This book represents the fruits of the author's studies for his Doctorate in Law at the University of Amsterdam. No reviewer can do other than admire his courage in tackling a subject which is, though full of the law's "nice sharp quillets," somewhat dry. The author is to be congratulated, too, on his wide reading—as evidenced by the very ample bibliography—which has enabled him to make a valuable contribution towards a clearer understanding of a topic of private international law to which comparatively little attention has been paid by English writers.

About a fifth of the book is devoted to an introductory section on the law of bankruptcy, the outstanding part of which is the Survey of Foreign Systems. In this Mr. Blom-Cooper treats of the insolvency laws of his Dutch hosts (one might have hoped for a little more than three pages on this), of the U.S.A. France and Belgium. The statement on page 33 that

"Rules of French law on this subject are 'purely jurisprudential,' *i.e.*, based on decided cases" and that on page 37 that the Belgian bankruptcy law "resembles strongly that of the French Civil Code" seem incompatible, since much of the French law is contained in the Code de Commerce and *lois*.[1] Mention might have been made also of the French system of judicial liquidation,[2] and a bolder and more critical summary of the four systems would have made a better conclusion to the first section.

The second section of the book is concerned entirely with the English conflictual problems in bankruptcy—jurisdiction, concurrent bankruptcies, foreign adjudications, their effect on English adjudications, administration in bankruptcy, and, finally, insolvent estates of deceased persons. One feels at times that too much of the private law aspects of the Act has been brushed aside—we are not reminded, for instance, that a debt of £50 or more, existing before the act of bankruptcy, is an essential for a creditor's petition. The statement on page 47, that "English law has made the clear distinction between national and alien" as regards bankruptcy jurisdiction, flies in the face of ss. 4 (1) (*d*) and 1 (2) of the Act, for the latter subsection defines "a debtor" as including, unless the context otherwise implies, "any person, whether a British subject or not." It is felt that *Re A Debtor* (*No.* 360 *of* 1951) [1952] 1 All E.R. 519, merited more lengthy consideration and deserved a fuller comparison with *Theophile* v. *Sol.-Gen.* [1950] A.C. 186, a case which the author discusses admirably. On page 56 there is an unfortunate reference to the Bankruptcy Rules, 1915, r. 158. These, of course, were replaced in 1952 by a new set of rules, so that reference should have been made to r. 86. In this connection, the statement that the registrar's discretion to allow service out of the jurisdiction "is unfettered," seems questionable, for even the High Court judge dealing with an application under R.S.C., Ord. 11 is bound by *The Hagen* [1908] P. 189. Reference to the recent cases of *Hopkins* v. *Hopkins* [1950] 2 All E.R. 1035, and to *Re Adoption Order No.* 52/1951 [1951] 2 All E.R. 931, might have been made in the discussion of "residence." Reference to section 3 of the Act and to the possibility of making a foreign infant bankrupt in England might also have been made.

The chapter on concurrent bankruptcies is the highlight of the thesis. The author is here at his most lucid, and the style and punctuation, which is not always of the highest standard in other parts of the book, is quite impeccable. It is, perhaps, not quite clear why *Re Kooperman* [1928] W.N. 101 should be called an "exception to the *lex situs* rule" in the chapter on foreign adjudications. It is a pity that no opportunity was taken to speculate on the possible impact of *Bendall* v. *McWhirter* [1952] 1 All E.R. 1307, on this case. The treatment of *Gibbs* v. *Société Industrielle* [1890] 25 Q.B.D. 399 is good, as also is the preceding discussion on relation back, though the brief *excursus* into the tort of libel leaves us with the impression that the decisions of *Bata* v. *Bata* [1949] W.N. 366, *Kroch* v. *Rossell & Co.* [1937] 1 All E.R. 725, and *Szalatnay-Stacho* v. *Fink* [1947] K.B. 1, together with Professor Yntema's views on the *locus delicti*,[3] have escaped the author's attention. The chapter on effects of an English bankruptcy is also praiseworthy, though one would have preferred a less succinct list of property which does not pass to the trustee. A brief excursion into the reputed ownership clause would have improved the chapter.

In the first section, the author has done no more than set out factually the main content of the four foreign systems with but little attempt at comparing them either with each other or, what is more important, with our own system. It would have been an improvement had he approached this part of the work so as, in the words of Professor Hamson, "to enable us, so far

[1] See, *e.g.*, *Introduction to French Law*, by Amos & Walton, pp. 361–363.
[2] *Ibid.*, p. 364.
[3] 15 Can.B.R. 115; 4 I.L.Q. pp. 7–10.

as may be possible, intelligently to observe the main features of our own system of law as a functioning social institution." [4]

The book is well set up, though unfortunately there is no index to the text.

One thing, however, is clear. No one hereafter researching into this topic can say he has properly done his work if he has failed to consult and rely on this book or on its reproduction in the current numbers of the *International and Comparative Law Quarterly.*

P. R. H. Webb.

Prideaux's Precedents in Conveyancing. Vol. 3. Twenty-fourth Edition. By the late J. Brook Richardson, M.A., Barrister-at-Law. [London: Stevens & Sons, Ltd. and The Solicitors' Law Stationery Society, Ltd. cxi and 1090 pp. (including Index, 120 pp.) £4 5s.]

Time was when it could be said that Prideaux was the set of Conveyancing Precedents which was almost exclusively used by Solicitors, while that by Key and Elphinstone was similarly a special province of Conveyancing Counsel. Neither proposition holds good today for many in each branch of the profession are quite accustomed to use both, and since the day when each held sway in its own particular favoured sphere other Richmonds have appeared in the field. However, since the twenty-second edition of Prideaux, which synchronised with the coming into effect of the property legislation of 1925, under the editorship in chief of the late Sir Benjamin Cherry, who was so closely associated with the framing of that legislation and had been the Editor of two previous editions, Prideaux took on a new lease of life, the Dissertations, always an especial feature of the work, taking on something in the nature of quasi-authority, *pace* the observation in *Re Ryder and Steadman's Contract* [1927] 2 Ch. 62 at p. 84 respecting the weight to be attached to the expression in a textbook by a well-known conveyancer. Volume 3 has always had the widest scope, including in its range Settlements, Trusts, Wills, Assents, Charities and a Miscellaneous section. The very comprehensiveness of the third volume brings out to the full the practical utility of the Dissertations above referred to. In view of the encyclopaedic compendia of the Law now available and the textbooks devoted to specific subjects, it is thought by some that the Dissertations, with their summary statements of the law and practice, have had their day and the subjects devoted to them should yield to the inclusion of more Precedents with their relevant annotations. It must be borne in mind, however, that to many practitioners a convenient and relatively portable volume containing both the law and its application in practice, the former in epitome and the latter *in extenso,* is an advantage in utility, and while the Dissertations cannot be exhaustive, they serve as reminders of salient principles and their relation to practice and also as pointers to the sources for further information. It is hoped that supplements dealing with subsequent developments in the law will be periodically issued until a new edition may be called for, especially in the section devoted to Settlements, Trusts and Wills having especial regard to the fluctuating nature of revenue legislation.

The section relating to Charities, although of no great length (it runs to a little over 40 pages), is the most comprehensive in the volumes of Precedents, other than those in the encyclopaedic compendia, and the preliminary Dissertation affords an admirable view of this most complicated branch of the law and conveyancing practice. The various sections relating to Trusts and Trust Instruments, including the appointment of New Trustees, seem to be very well done and this volume follows its predecessors in the set of this

[4] In a broadcast talk on the Third Programme in February, 1952, reprinted in *The English Trial and Comparative Law*, p. 10.

edition in affording a number of Common and not always so common Forms which can be utilised with and independently of the Precedents. The annotations which are very full do not extend beyond 1952 and the practitioner need hardly be reminded that this fact must be borne in mind, as conveyancing nowadays becomes increasingly affected by legislation which at first sight would not suggest any particular relation to the contemplated draft. With this kept in view the present volume should prove a valuable addition to the equipment essential in conveyancing practice. The style of the Precedents continues the Prideaux tradition, as readapted to requirements of the 1925 property legislation at the hands of the late Sir Benjamin Cherry and his collaborators. This tradition was the better preserved by reason of the fact of the late Sir Benjamin's editorship of some of the pre-1926 editions previously mentioned. If some prefer other styles, as above indicated, they have their choice, but there could be no doubt, as he who runs may read, that the Precedents proceed with a steady gait and an avoidance of verbal surplusage, perhaps at times with a phraseological economy which hardly seems called for, but that is a not unwelcome change from the prolixity of the past. Messrs. Stevens, the publishers, it is good to find, continue the practice of giving the dates, the authors and editors of previous editions, which is not only an act of due *pietas* but has an historical interest that in the case of a difference of opinion of successive editors may prove of practical value. Looking back to the whole work of this edition it stands as a remarkable tribute to the learning and industry of the editor, the late Mr. J. B. Richardson, who edited this monumental production single-handed, a remarkable achievement which had not been accomplished since the original author's second edition in 1856 and Mr. Whitcombe's edition (the seventeenth in 1899). As Mr. Richardson regrettably passed away when engaged in the final revision of the volume, it was finally prepared for the press by Mr. H. D. C. Webb, Barrister-at-Law, who in the preface expresses his thanks to Mr. A. Johnstone and Mr. I. Goldsmith, Barristers-at-Law, for their collaboration.

Bertram B. Benas.

The Taxation of Gifts and Settlements, including Pension Provisions, by Stamp Duty, Estate Duty, Income Tax and Surtax. Second Edition. By G. S. A. Wheatcroft, M.A. (Oxon)., a Master of the Supreme Court (Chancery Division). [London: Sir Isaac Pitman & Sons, Ltd. 1954. xxix and 174 pp. with (index) 20 pp. 42s. net.]

The purpose of this excellent work is to enable the practising solicitor or barrister to appreciate, without having to call in the "tax expert," the taxation problems that, all unknowingly to him, can arise in connection with gifts, wills, settlements and the administration of estates or trusts; very often quite an ordinary transaction, in no way connected in its origin with taxation, may produce dire and unexpected taxation results.

The work is divided into two parts, in the first of which (Chapters 1–7) Mr. Wheatcroft gives a concise, though inevitably superficial, outline of each of the four taxes dealt with, namely Stamp Duty, Estate Duty, Income Tax and Surtax; this part is probably of value only to the non-legal professional man such as a stockbroker, banker or the like. It is part II (Chapters 8–17) which is so valuable, for in them the learned author considers the effect of each of the four taxes upon the various types of transaction envisaged with special reference to the property settled or given, the persons concerned and, perhaps most important, the form in which the transactions are ultimately embodied. Mr. Wheatcroft shows how methods devised to mitigate the burden of one of these taxes may result in an even greater increase in another, *e.g.*,

a reduction in current income and surtax may be effected at the cost of more burdensome duties when death occurs.

The more outstanding chapters in Part II are: (Chapter 10), "Shares Debentures, etc.," with its special emphasis on "controlled" companies and how such control may safely be divested—the importance of "control" is also shown from the angle of the "approval" of superannuation funds by the Revenue. (Chapter 13), "Donees and Beneficiaries," with particular stress on the effect of "relationship" between donor and beneficiary; Mr. Wheatcroft pungently observes that if the donee is wealthy it is better to make an absolute gift of capital than to settle an income on him. (Chapter 14), "The Trustees" who are considered under four heads (i) their selection, (ii) their personal liability, (iii) their residence, and (iv) their remuneration with special reference to *Dale* v. *I.R.C.* [1954] A.C. 11; in the learned author's opinion it is desirable that trustees should be professional or business men of standing or trust corporations; and (Chapter 16), "Pensions, Pension Funds and Retirement Benefits," where, since the "approval" by the Revenue of the fund is a condition precedent to taxation gains, the *practice* of the Department is often more important than the bare wording of the statutes.

The most valuable chapter in the whole book is, in your reviewer's opinion, the last (Chapter 18)—"Trends of Future Taxation"—for, as Mr. Wheatcroft so trenchantly comments, the testator or settlor is much more concerned with the law of the future than the law of today; the last quarter of a century has shown how the taxation effects of a gift or settlement may be drastically altered for the worse as a result of legislation or decisions of the appellate courts reversing long-standing doctrine. The learned author postulates three criteria for forecasting the trend of future legislation, namely, (i) is the mode of mitigation generally adopted and does it cause serious loss to the Revenue, (ii) can the law be altered without serious administrative difficulties, and (iii) does the average man or M.P. consider the transaction of little merit? Applying these tests to the five commonest types of transaction, Mr. Wheatcroft considers that mitigation by means of "deeds of covenant" (save perhaps for charities) and by the purchase by a tenant for life of the remainderman's interest are likely to be abrogated in the near future; that, if administrative difficulties can be overcome, the same result may be expected regarding the basis of valuation of gifts (see *Sneddon* v. *Lord Advocate* [1954] 2 W.L.R. 211) and discretionary trusts; but that the five-year limit for gifts *inter vivos* is likely to remain undisturbed.

Enough has been said to show the value of this work not only to the practitioner but also to accountants and other professional men who are concerned with trusts, etc., and their problems. The book is eminently readable and not over-documented with references to cases; the mere fact that a second edition has been called for within a year bespeaks in itself its value to all concerned with wills, settlements, trusts and the like.

A. Farnsworth.

International Relations. The World Community in Transition. By N. D. Palmer and H. C. Perkins. [Stevens & Sons, Ltd. 1954. pp. 1270. £2 15s. net.]

As Professor Manning has observed, a student of international relations is "a person who regrets that he does not better understand psychology, economics, diplomatic history, law, jurisprudence, sociology, geography, perhaps languages, comparative constitutional organisations, and so on down a long list." The present reviewer conceives his main aim for the purposes of a review in this journal to be the assessment of how far a student reading this book would find his regret at knowing too little of law, and international law in particular, diminished in the reading.

Initially one sympathises with the authors in the magnitude and complexity of their task. To present a lucid, analytical study of interstate relations, examining firstly the basic premises of international relations, secondly the historical development of those relations between the years 1900–1945, and thirdly the post World War II developments in all their complexity is a tremendous undertaking. Let it be stated at the outset that the authors have discharged their task with an admirable thoroughness and sense of balance, without any of the clever cynicism which tends so often to reveal a lack of real objectivity. The book is never dull, and is, indeed, often almost alarmingly illustrated with cartoons and diagrams of great simplicity; most important of all, perhaps, it is well documented after every chapter so as to afford to the student every opportunity for fuller study of specific problems.

Certain comments may be made without revising this commendation. The earlier, rather abstract, chapters on Sovereignty, and the analysis of National Power are not very fruitful; one feels the authors are bemused by the "one and indivisible" which lawyers have long ago discarded as inaccurate and inept in international relations. Perhaps it is expecting too much in a book of this breadth and scope to explain a concept as variable as the jurisdictional powers which alone give it substance. There are some omissions which detract from the capacity of the book to impart real understanding. The Dangers of Open Diplomacy are partly discussed but without mention of the provision for registration of treaties in the Covenant and the Charter (pp. 177–9). Propaganda as an instrument of diplomacy is also discussed (pp. 185–7) but without in any way being related to principles of non-intervention. Later, in Chapter 9, the term "collective security" is used frequently and illustrated by the Concert of Europe, the League, and the United Nations, but is left undefined either in terms or in essentials until the next chapter. The relationship between neutrality and collective security is dismissed in one enigmatic sentence which includes a quotation from Jessup suggesting neutrality may become "an antisocial status" (p. 380), and generally Chapter 9 on International Law has a terseness which is unsatisfactory. In another case, where in Chapter 27 the problem of the veto is discussed, no mention is made of that abuse of abuses the "double-veto," and this again is detrimental to a complete understanding of the real limitations in Article 27 of the Charter. The answer may well be, of course, that in a book such as this the authors can do no more than indicate the general issues and leave the student to seek in the more specialised works the answers to the many problems which, to give them their due, the authors often raise.

There are, too, a few "judgments" which are questionable; the Kellogg Pact is dismissed as of no more than "symbolic importance" (p. 295) on the basis that the reservation of self-defence made the obligations meaningless (this is one part of the book in which the authors tend to rely too exclusively on the opinions of one writer), although the authors clearly know all about Nuremberg and its significance (p. 297). In dealing with the Legislative Function one finds the authors saying that States "may ratify (a treaty) and then ignore or repudiate it" (p. 401); most international lawyers would require a qualification of this word "may." In denying the existence of an international criminal law (p. 407) the authors seem to assume that this is a necessary corollary to the absence of an international criminal court; again most international lawyers would require this denial, or at least the reasoning behind it, to be qualified.

In the main, however, the criticisms which any one "specialist" may make are of incompleteness, and, when one bears in mind the immense scope of this book, the fault is inevitable; it lies in the nature of the subject, not in its treatment by the authors. The final part of the book is especially commendable for there one sees a genuine attempt to sketch the whole field of development since 1945. The United Nations, European Unity, Korea, the Acheson Plan, Absence and Abstention, Representation, in fact many

of the problems of immediate interest to the lawyer are set against a background which is political, economic and social as well as legal in its implications. The value of the book must vary with the purpose for which any particular reader requires it; yet it is difficult to envisage the reader who can fail to derive some benefit from this extremely comprehensive and objective study.

D. W. Bowett.

Deprived Children: The Mersham Experiment: A Social and Clinical Study. By Hilda Lewis, M.D., M.R.C.P., with a foreword by Sir Arthur Ellis and Dr. C. P. Blacker. [London: Published for the Nuffield Foundation by Geoffrey Cumberlege, Oxford University Press. 1954. xvii and 163 pp. 9s. 6d. net.]

This is the kind of study important to those interested not only in what the law says, but also in what it means in human terms. The description and analysis of the circumstances of 500 children received into the Mersham reception centre during the difficult years of 1947–50 is of particular value now that, under the Children Act, 1948, all county authorities must provide such reception centres. Dr. Lewis, the centre's psychiatrist, includes also the results of an inquiry into what had happened to 240 of the children between two and three and a half years after they had left Mersham.

These 500 children presented difficult problems. Fit person orders had been made for 200 of them before they reached Mersham, and were made subsequently for another 75 on the centre's recommendation. Recommendations for similar orders for another ten children were not complied with; more information about this would have been welcome. Those rejects of law and society, the illegitimate, accounted for 116 (23 per cent.) of the children. (This compares with a birthrate for illegitimate children varying between a normal of about 4 per cent. and a peak of 9 per cent. in 1945.) Eighteen of them had been adopted, sixteen into unsatisfactory homes, where two had been cruelly treated. (Unfortunately we are not told how many of these were legal adoptions, although presumably at least the one child placed by a registered adoption society was the subject of an adoption order.) Two hundred and fifty of the children had previously been in public care.

The inadequacies of present arrangements for such children are not expressly adverted to, but some of them emerge clearly. Maladjusted children cannot be placed in suitable homes, as not enough of these are available. There is an acute shortage of foster homes, but this will surprise no one who has considered the agreement foster-parents are called upon to sign before receiving children.

The book contains seventy-one statistical tables analysing various aspects of the problems involved, and these are clothed with life in the case-summaries of twenty-four children, which appear in an appendix. There is perhaps a slight tendency to retail statistics for their own sake. Does the number of children more than 2lb. below or above average weight at reception (p. 36) mean anything, for example? But Dr. Lewis shows a healthy distrust of striking generalisations. Nevertheless, some emerge that may be useful if carefully handled. (The sample was, after all, small and localised, the times unusual.) In particular there is no evidence to show that separation from the mother, unless it had occurred before the child was two years old, and had been lasting, had any particular effect on the child's mental state, although the follow-up inquiry showed a rather stronger link between separation and abnormality. On the other hand, lack of affection by either parent, and particularly the mother, tended to produce unsocialised aggressive behaviour in the child; so did a prolonged period

in public care. A mentally unstable mother, or excessive discipline, both tended to produce neurosis in the child. Socialised delinquency appeared to be associated with neglect and bad company, but not with lack of parental discipline. (Will the "spare the rod" school, which includes some of Her Majesty's judges, please note?) The follow-up inquiry revealed that more than three-quarters of the children originally referred to the centre for stealing had ceased to do so, and that in general neurotic symptoms persisted to a greater extent than delinquent behaviour.

Although the author is careful to guard against over optimism, her conclusions that both the centre and the study were worth while seems amply justified.

O. M. Stone.

In Memory of Leonard Nelson. Edited by Minna Specht and Willi Eichler. [Publisher: "Öffentliches Leben," Frankfurt am Main, Göttingen. 1953. 306 pp. Dm. 14,70.]

People of various callings in different countries, united by a common acquaintance with Leonard Nelson, bear witness in this remarkable book to the fruitfulness of his idealistic thought. Leonard Nelson, a German philosopher, and one of the pioneers in the German youth movement (Freideutsche Jugend), died more than twenty-five years ago at Göttingen, when barely forty-five years old. He was an important personality and philosopher, whose works have neither yet received the recognition they merit, nor even been adequately understood.[1] The political development after his death has proved how much posterity has been the loser by this neglect. Nelson surpassed his contemporaries by reason of his undogmatic and ethically based exposition of universal and essential values, as well as by his practical life, which was characterised by integrity and the courage to risk everything for the sake of truth. To take the practical consequences of his ideas was his main aim.

Nelson's *Jurisprudence without Justice* (Rechtswissenschaft ohne Recht, 1st edition 1917, 2nd edition 1949, by Curt Staff), is an attack of inexorable vehemence and weight on the jurisprudence of theoretical nihilism, which led inevitably to practical nihilism in the life of nations. "This lawyer's trick," he calls it, "which has caused jurisprudence to be increasingly degraded into the servant of politics, and the latest fruits of which we are reaping in this war." He was searching for a law, objective and independent of any human acknowledgment, which owes its binding force neither to a regard for social or political expediency, nor to the respect due to historical tradition. In his great works: *Kritik der praktischen Vernunft* (1919) and *System der philosophischen Ethik und Pädagogik* (edited in 1931 by Grete Hermann and Minna Specht out of his literary bequest), he works out his theory of a law based on ethics, which is discoverable not by experience but by reason. Developing further the ideas of Immanuel Kant and Jakob Friedrich Fries, he seeks to discover in them the imperishable substance of law by reducing it in its ultimate analysis to a universally valid rule of practical human reason, which is closely connected with the rule of morality. This rule he finds in the principle of the personal equality of all human beings. A society of reasonable beings fulfils the conditions of this legal rule if everyone treats everybody else with whom he comes in contact as his equal. "Never act in such a way that you

[1] Translations into English. Leonard Nelson: *Politics and Education*, by W. Landsdell, with a foreword by W. J. Roberts, London, 1928; and Leonard Nelson: *Socratic Method and Critical Philosophy; Selected Essays*, by Thomas K. Brown. Foreword by Brand Blanshard, Introd. by Julius Krafft, New Haven, Yale Univ. Pr., 1949.

could not agree with your conduct if the interests of your opponents were your own." Nelson supplements this categorical imperative, which contains the negative condition for social life, with the ideal of the maximum possible mental freedom, the spontaneity of reason in the organisation of life, which determines the positive requirements for a life of value. The mingling of the two leads to the conclusion: "All reasonable beings have the right to equal external possibilities to reach self-determination."

This memorial volume shows the importance of such ideas for the evolution of a society. Julius Krafft, of New York, first examines thoroughly Leonard Nelson's place in the philosophy of the twentieth century; there follows an up-to-date analysis by Grete Hermann of the connection between the moral demands of Nelson's ethics and the results of modern physics. Of special interest to lawyers are the warm-hearted answer provided by Fritz von Hippel to the question of what Nelson's "Rechtswissenschaft ohne Recht" signifies for us today, and the contribution by Willi Eichler, which emphasises the practical needs of the present time and, in its political content, approaches the idea of a community based on legal and moral laws, to which Nelson's ethical Realism also leads.[2] In addition to this clarification of the concept of law, Hans Peter deals with the concept of freedom in the free economic system.

Other contributions are concerned with Leonard Nelson as a practical educator as he laboured continuously to influence the organisation of public life by the teaching and training of body and mind. Open-mindedness and independent spirit, rejection of all totalitarian endeavours, seemed to him the main pedagogical aims for his younger and older disciples. Especially during the last years of his life Nelson concentrated on these practical issues, in which he sought particularly the help of working class youth. In 1917 he founded the International Youth Organisation, and in 1926 the International Socialist Fighting Group. The "Internationale Sozialistische Kampfbund" was created to give practical effect to the idea that men who call themselves socialists should also live up to this principle—a demand which had its special importance in those years of growing National-Socialism. In addition he worked closely with the private educational establishment Walkemühle, which was built up through his own activities. Closed down in 1933 by Hitler, this institution came to England in 1938, after a short stay in Denmark. It is hoped that the pedagogical results of the work done in the Walkemühle will be published in the near future by assistants of Leonard Nelson. Nevertheless, I should have liked to find rather more about this side of Nelson's life in this memorial volume, which concentrates mainly on his theoretical works. Nelson's importance as an idealistic cosmopolitan is most clearly seen in his practical work, and the problems of the education of the young in relation to the development of law has an especial importance today.

W. MÜLLER-FREIENFELS.

ASCAP: COPYRIGHT LAW SYMPOSIUM No. 5. [Columbia University Press. (London: Geoffrey Cumberlege.) 32s. net.]

THIS is a collection of prize-winning essays for 1951–52 for the Nathan Burkan Memorial Competition for law students, sponsored by the American Society of Composers, Authors and Publishers (ASCAP) on various branches of the law of copyright. It is not of course a textbook on the American law of copyright, but the essays range over a wide field and include essays on the

[2] Willi Eichler, assistant and secretary of Leonard Nelson, has also published *Leonard Nelson, A Picture of his Life and Work*, Editions nouvelles internationales, Paris, 1938.

new problems in copyright law presented by such comparatively recent developments as television and strip cartoons.

The standard of the essays is high, but it must not be overlooked that the entries are drawn from 112 law schools—an astronomical figure from our standards. Two of the essays obtained national awards and the remaining eight "honourable mentions." The most scholarly essay is perhaps that entitled "Superman v. Captain Marvel"; or "The Loss of Literary Property in Comic Strips." In his conclusion the author says whether we like them or not comic strips and comic magazines appear to be here to stay, with an estimated 60,000 of the latter being sold on the news stands every month. . . . It has been seen that comic strips *do* constitute subject-matter of copyright, regardless of the presence or absence of literary merit. . . . If there still exists a quandary as to whether comic strips should be copyrighted as books or as pictorial illustrations, it must await future judicial interpretation to be resolved." The problem is not quite the same in this country, where registration of a copyright is not a necessary requirement in an action for infringement of copyright, but no one could deny the prevalence of the comic strip with probably its ensuing problems in copyright law.

Of particular interest owing to the recent prosecutions for obscene literature is the essay "Publication of Immoral and Indecent Works, with Regard to the Constitutional and Copyright Effects." The author of this essay warns that the exclusion of literature upon the grounds of obscenity is a dangerous step and, while necessary, must be carefully watched so that "our liberties may be preserved." He quotes the late Judge Augustus Hand who said in *United States* v. *One Book Entitled Ulysses* by James Joyce, 72 F. 2d 7051708 (2d Civ. 1934): "The foolish judgments of Lord Eldon about one hundred years ago, proscribing the works of Byron and Southey, and the finding by the jury under a charge by Lord Denman that the publication of Shelley's 'Queen Mab' was an indictable offence gave a warning to all who try to determine the limits of the field within which authors may exercise themselves." Alas, Judge Hand's warning has not reached the ears of some persons in this country!

It is obviously impossible in the compass of a short review to deal with all the essays, but of considerable interest are the two essays respectively on the infringement and protection of ideas, and the essay relating to the position of television with regard to the law of copyright. Possibly of interest to a more limited class is the essay on defences peculiar to actions based on infringement of musical copyright, a subject on which there are few reported cases in England.

To anyone at all interested in the law of copyright the book may be recommended; the elegance of its get-up, footnotes, indexing, is worthy of a standard textbook.

I. G. R. M.

THE LAW IN ACTION: A Series of Broadcast Talks. [London: Stevens & Sons, Ltd. 1954. pp. 90. 7s. 6d. net.]

THIS series of broadcast talks was "planned" by a small committee, of which several of those who took part in it were members under the Chairmanship of the late Lord Asquith of Bishopstone, who contributes a foreword to the present volume.

The series consists of six talks, each by an eminent graduate of the Cambridge School of Law, which seems to have acquired a monopoly position with the B.B.C. in respect of this line of business. The subjects discussed and the lectures are as follows:—The Question of Damages for Shock, by Professor Goodhart; The Liability of Hospitals for Negligence, by Professor C. J. Hamson; The Matrimonial Home, by R. E. Megarry; Expulsion from

Trade Unions, by Trevor C. Thomas; Public Mischief and Conspiracy, by Professor Glanville Williams; and Administrative Law and the Right of Self Defence, by H. W. R. Wade.

Lord Asquith says in his introduction that the talks were "planned"; it is a little difficult to see where the "planning" comes in, as the subjects chosen for discussion have clearly no connection with one another, except in so far as they are all concerned with matters of immediate practical moment, on which important decisions have been given of recent years. Nor is there any obvious homogeneity of treatment. Some of the talks seem to be directed at an educated home service audience, others at a third programme audience, and still others at an audience which has already the advantage of some smattering of legal knowledge. Nevertheless they are of considerable individual interest, as one would expect from a team of such distinction, and well worth making available in book form for those who were unable to listen to the original broadcasts. What gives them life and colour is the personal and individual approach of the various lecturers, each of whom leaves his audience in no doubt as to what he thinks the law ought to be when it is not to his liking.

C.

A GUIDE TO THE HOUSING REPAIRS AND RENTS ACT, 1954 (Current Law Guide No. 11). By ASHLEY BRAMALL. [London: Sweet & Maxwell, Ltd. and Stevens & Sons, Ltd. Second Edition. xii and 174 pp. and (Index) 6 pp. 8s. 6d. net.]

SHAW'S GUIDE TO THE INCREASE OF RENTS. By QUENTIN EDWARDS. [London: Shaw & Sons, Ltd. xiii and 156 pp. and (Index) 25 pp. 10s. 6d. net.]

MR. BRAMALL'S Guide to the Housing Repairs and Rents Act, 1954, is a first-class handbook to this important and complicated statute and it is a sufficient testimony to its value to the practitioner that the first edition was sold out within a fortnight, necessitating an immediate new edition. This handbook, of course, deals in great detail with the question of the Repairs Increases introduced by section 23 of the Act and the exposition is illustrated with valuable examples. In addition there is a full discussion of the many important amendments made in the general law of landlord and tenant and that relating to the provision of housing, matters which are less widely known than the rent increase provisions. More particularly, Mr. Bramall deals with the powers of local authorities to deal with unfit houses and to make conversion and improvement grants to developers of house property. He also discusses the new situation arising as a result of section 35 of this Act, whereby, for the first time since 1939, private landlords may let new and converted houses as separate dwellings within the limits of the Rent Restriction Acts without coming within control.

This book includes the text of the Act in full and all the relevant Rules and the prescribed forms. It is complete and comprehensive and entirely to be recommended to the practitioner asked to advise on this Act.

Mr. Edwards' book is narrower than the *Current Law Guide* in that it deals only with increases of rent; at the same time it is wider, in that its scope embraces also the field of permitted increases under the Rent Restriction Acts and is not limited to the Repairs Increases of rent authorised by the 1954 Act. In the circumstances the author was obviously right in dealing with his subject within the general framework of the Rent Acts, but it is rather surprising that, while doing so, he takes so much detailed knowledge of the Acts for granted. Moreover the discussion of the standard rent (a fundamental matter) is not to be found in the text at all but is relegated to an appendix. Nevertheless, within its limits this is a useful book. Of

particular value to anyone advising on this subject is the appendix of forms, which are not confined to those prescribed by the Rules but include also additional precedents dealing with such matters as certificates of non-repair and information of sublettings of controlled dwelling-houses.

HAMISH R. GRAY.

INTERNATIONAL POLITICAL SCIENCE ABSTRACTS. Vol. 6, No. 1. [Paris: UNESCO; London: H.M.S.O. 1954. 159 pp. 7s.]

STUDENTS of political science have always been handicapped by the amount of material published in their subject in most of the countries of the world. Since 1945 the volume has increased, and with it the difficulties. Even if one were able to read all the languages in which such literature was produced, and had the time to do so, currency and customs regulations would contribute their quota in thwarting the free circulation of knowledge, which is one of UNESCO's aims. In order to reduce these difficulties UNESCO has instituted its quarterly publication of International Political Science Abstracts. In the current number 399 articles from 100 periodicals published between October and December, 1953, have been abstracted, some receiving just two or three lines and others as much as half a page.

Abstracts are classified under six headings: political science, political theory, government and political administration, governmental process, international relations and area studies. International organisation and international politics constitute the two parts of international relations: "La Cour de justice de la C.E.C.A. et la Cour internationale de justice," summarised from the *Revue générale de droit international public,* is followed by a précis of an article in the *India Quarterly* on "The need for an international university." Although some of the European periodicals on international law are included, and articles appearing in the *International and Comparative Law Quarterly* are abstracted, there is no reference to the *American Journal of International Law* in the October, 1953, issue of which there was an article on "The International Claims Commission of the United States" and another on "Legal Questions concerning the United Nations." The only English legal periodical mentioned, apart from the I.C.L.Q., is the *Modern Law Review* from which Professor Glanville Williams's "Preventive Justice and the Rule of Law" has been reduced to sixteen lines.

It is easy to criticise a venture of this kind for having ignored a particular periodical or omitted a special article. Such a carping attitude, however, ignores the positive features of the publication. Through its medium the political scientist is given some lead to topical writing and developments in his own field and an abstract may easily be the introduction to a previously unknown article.

L. C. GREEN.

Books and Publications Received

LA CONVENTION FISCALE FRANCO-BRITANNIQUE DU 14 DECEMBRE, 1950. Etude d'Application Pratique. Par DR. F. E. KOCH et JEAN H. ROTHSTEIN. [179 pp. International Bureau of Fiscal Documentation. Herengracht 196, Amsterdam. 1954.]

ANNALES DE LA FACULTÉ DE DROIT DE BELGRADE. Revue Trimestrielle des Sciences Juridiques et Sociales. 1953/4.

FINAL REPORT ON CALIFORNIA SEXUAL DEVIATION RESEARCH. March, 1954. State of California Department of Mental Hygiene.